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United Nations

Report of the International Law Commission

Fifty-fifth session
(5 May-6 June and 7 July-8 August 2003)

General Assembly
Official Records
Fifty-eighth session
Supplement No. 10 (A/58/10)

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CONTENTS

Chapter	*Paragraphs*	*Page*
I. INTRODUCTION	1 - 13	13
A. Membership	2 - 4	13
B. Officers and Enlarged Bureau	5 - 7	15
C. Drafting Committee	8 - 9	16
D. Working Groups	10 - 11	16
(a) Working Group on Responsibility of international organizations	10	16
(b) Working Group on Diplomatic Protection	10	17
(c) Working Group on International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)	10	17
(d) Working Group on Unilateral acts of States	10	17
(e) Study Group on Fragmentation of international law: Difficulties arising from the diversification and expansion of international law	10	17
E. Secretariat	12	17
F. Agenda	13	18
II. SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-FIFTH SESSION	14 - 24	19
III. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION	25 - 40	22
A. Responsibility of international organizations	26 - 27	22

CONTENTS (*continued*)

Chapter	*Paragraphs*	*Page*
B. Diplomatic protection	28 - 29	23
C. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)	30	23
D. Unilateral acts of States	31 - 33	24
E. Reservations to treaties	34 - 39	25
F. Shared natural resources	40	27
IV. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS	41 - 54	29
A. Introduction	41 - 42	29
B. Consideration of the topic at the present session	43 - 52	30
C. Text of draft articles on responsibility of international organizations provisionally adopted so far by the Commission	53 - 54	33
1. Text of draft articles	53	33
2. Text of the draft articles with commentaries thereto adopted at the fifty-fifth session of the Commission	54	34
Article 1. Scope of the present draft articles		34
Commentary		34
Article 2. Use of terms		38
Commentary		38
Article 3. General principles		45
Commentary		45

CONTENTS (*continued*)

Chapter	*Paragraphs*	*Page*
V. DIPLOMATIC PROTECTION	55 - 153	50
A. Introduction	55 - 65	50
B. Consideration of the topic at the present session	66 - 151	52
1. Article 17	70 - 92	53
(a) Introduction by the Special Rapporteur	70 - 75	53
(b) Summary of the debate	76 - 86	56
(c) Special Rapporteur's concluding remarks	87 - 89	59
(d) Establishment of a Working Group	90 - 92	60
2. Article 18	93 - 104	61
(a) Introduction by the Special Rapporteur	93 - 95	61
(b) Summary of the debate	96 - 101	62
(c) Special Rapporteur's concluding remarks	102 - 104	64
3. Article 19	105 - 113	65
(a) Introduction by the Special Rapporteur	105 - 107	65
(b) Summary of the debate	108 - 112	66
(c) Special Rapporteur's concluding remarks	113	67
4. Article 20	114 - 123	68
(a) Introduction by the Special Rapporteur	114 - 116	68
(b) Summary of the debate	117 - 122	69
(c) Special Rapporteur's concluding remarks	123	70

CONTENTS (*continued*)

Chapter	*Paragraphs*	*Page*
5. Article 21	124 - 139	71
(a) Introduction by the Special Rapporteur	124 - 127	71
(b) Summary of the debate	128 - 135	73
(c) Special Rapporteur's concluding remarks	136 - 139	75
6. Article 22	140 - 151	76
(a) Introduction by the Special Rapporteur	140 - 142	76
(b) Summary of the debate	143 - 148	78
(c) Special Rapporteur's concluding remarks	149 - 151	80
C. Text of draft articles on diplomatic protection provisionally adopted so far by the Commission	152 - 153	81
1. Text of draft articles	152	81
2. Text of the draft articles with commentaries thereto adopted at the fifty-fifth session of the Commission	153	85
Article 8 [10] Exhaustion of local remedies		85
Commentary		85
Article 9 [11] Category of claims		89
Commentary		89
Article 10 [14] Exceptions to the local remedies rule		92
Commentary		92

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

VI. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES) .... 154 - 231 103

- A. Introduction .... 154 - 164 103
- B. Consideration of the topic at the present session .... 165 - 231 107
  - 1. Introduction of the first report by the Special Rapporteur .... 167 - 175 107
  - 2. Summary of the debate .... 176 - 224 113
    - (a) General comments .... 176 - 192 113
    - (b) Comments on the summation and submissions of the Special Rapporteur .... 193 - 224 118
      - (1) Application of regime to be without prejudice to other civil liability schemes (paragraph 174, subparagraph (c) (1)) .... 197 - 199 119
      - (2) Application of regime to be without prejudice to claims under international law (paragraph 174, subparagraph (c) (2)) 200 120
      - (3) Scope of topic similar to draft articles on prevention (paragraph 174, subparagraph (c) (3)) .... 201 - 202 121
      - (4) "Significant harm" same threshold as in the draft articles on prevention of transboundary harm (paragraph 174, subparagraph (c) (4)) 203 121

CONTENTS (*continued*)

Chapter	*Paragraphs*	*Page*
(5) State liability exception as a basis for a model of liability (paragraph 174, subparagraph (c) (5))	204	121
(6) Liability for person in command and control (paragraph 174, subparagraph (c) (6))	205 - 206	122
(7) Test of reasonableness as basis for establishing causal link (paragraph 174, subparagraph (c) (7))	207	123
(8) Exceptions to limited liability (paragraph 174, subparagraph (c) (8))	208	123
(9) Joint and several liability (paragraph 174, subparagraph (c) (9))	209	123
(10) Limited liability to be complemented by supplementary funding mechanisms (paragraph 174, subparagraph (c) (10))	210 - 215	124
(11) Other obligations for States, including availability of recourse procedures (paragraph 174, subparagraph (c) (11) and (12))	216 - 218	125
(12) Damage to the environment, environment per se and loss of profits and tourism (paragraph 174, subparagraph (c) (13) and (14))	219 - 221	126
(13) Form of instrument	222 - 224	127
3. Special Rapporteur's concluding remarks	225 - 231	128
VII. UNILATERAL ACTS OF STATES	232 - 308	131
A. Introduction	232 - 243	131

CONTENTS (*continued*)

Chapter			*Paragraphs*	*Page*
	B.	Consideration of the topic at the present session	244 - 302	133
		1. Introduction by the Special Rapporteur of his sixth report	246 - 271	133
		2. Summary of the debate	272 - 297	137
		3. Special Rapporteur's concluding remarks	298 - 302	143
	C.	Report of the Working Group	303 - 308	144
		1. Scope of the topic	304 - 306	144
		2. Method of work	307 - 308	145
VIII.	RESERVATIONS TO TREATIES		309 - 368	148
	A.	Introduction	309 - 325	148
	B.	Consideration of the topic at the present session	326 - 366	152
		1. Introduction by the Special Rapporteur of his eighth report	332 - 339	154
		2. Summary of the debate	340 - 359	158
		3. Special Rapporteur's concluding remarks	360 - 366	163
	C.	Text of draft guidelines on reservations to treaties provisionally adopted so far by the Commission	367 - 368	165
		1. Text of draft guidelines	367	165
		2. Text of the draft guidelines with commentaries thereto adopted at the fifty-fifth session of the Commission	368	188
		Explanatory note		188
		Commentary		189

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

2.5 Withdrawal and modification of reservations and interpretative declarations 189

Commentary 189

2.5.1 Withdrawal of reservations 190

Commentary 190

2.5.2 Form of withdrawal 201

Commentary 201

2.5.3 Periodic review of the usefulness of reservations 207

Commentary 207

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level 209

Commentary 210

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations 218

Commentary 219

2.5.6 Communication of withdrawal of a reservation 221

Commentary 221

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation 226

Commentary 227

2.5.8 [2.5.9] Effective date of withdrawal of a reservation 231

Commentary 231

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

Model clause A - *Deferment of the effective date of the withdrawal of a reservation* 239

Commentary 240

Model clause B - *Earlier effective date of withdrawal of a reservation* 240

Commentary 240

Model clause C - *Freedom to set the effective date of withdrawal of a reservation* 241

Commentary 241

2.5.9 [2.5.10] Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation 242

Commentary 242

2.5.10 [2.5.11] Partial withdrawal of a reservation 244

Commentary 244

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation 256

Commentary 256

IX. SHARED NATURAL RESOURCES .... 369 - 406 260

A. Introduction .... 369 - 371 260

B. Consideration of the topic at the present session .... 372 - 406 260

1. Introduction by the Special Rapporteur of his first report .... 374 - 381 261

2. Summary of the debate .... 382 - 402 262

3. Special Rapporteur's concluding remarks .... 403 - 406 266

CONTENTS (*continued*)

Chapter *Paragraphs* *Page*

X. FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW .... 407 - 435 267

A. Introduction .... 407 - 411 267

B. Consideration of the topic at the present session .... 412 - 414 268

C. Report of the Study Group .... 415 - 435 269

1. General comments .... 415 - 423 269

2. Tentative Schedule, Programme of work and methodology .... 424 - 428 273

3. Discussion of study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes" .... 429 - 435 274

XI. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION .... 436 - 470 276

A. Programme, procedures and working methods of the Commission and its documentation .... 436 - 438 276

1. Working Group on long-term programme of work 439 276

2. Documentation of the Commission .... 440 - 443 276

3. Relations of the Commission with the Sixth Committee .... 444 - 446 278

4. Honoraria 447 279

B. Date and place of the fifty-sixth session 448 280

C. Cooperation with other bodies .... 449 - 455 280

D. Representation at the fifty-eighth session of the General Assembly .... 456 - 457 281

E. International Law Seminar .... 458 - 470 282

CHAPTER I

Introduction

1. The International Law Commission held the first part of its fifty-fifth session from 5 May to 6 June 2003 and the second part from 7 July to 8 August 2003 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Robert Rosenstock, Chairman of the Commission at its fifty-fourth session.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain M. Al-Baharna (Bahrain)
Mr. Ali Mohsen Fetais Al-Marri (Qatar)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique Candioti (Argentina)
Mr. Choung Il Chee (Republic of Korea)
Mr. Pedro Comissario Afonso (Mozambique)
Mr. Riad Daoudi (Syrian Arab Republic)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Ms. Paula Escarameia (Portugal)
Mr. Salifou Fomba (Mali)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Fathi Kemicha (Tunisia)

Mr. Roman Anatolyevitch Kolodkin (Russian Federation)

Mr. Martti Koskenniemi (Finland)

Mr. William Mansfield (New Zealand)

Mr. Michael Matheson (United States)[1]

Mr. Theodor Viorel Melescanu (Romania)

Mr. Djamchid Momtaz (Islamic Republic of Iran)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Didier Opertti Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmeraju Sreenivasa Rao (India)

Mr. Victor Rodríguez Cedeño (Venezuela)

Mr. Robert Rosenstock (United States)[2]

Mr. Bernardo Sepulveda (Mexico)

Ms. Hanqin Xue (China)

Mr. Chusei Yamada (Japan)

3. At its 2751st meeting, on 5 May 2003, the Commission elected Mr. Constantin P. Economides (Greece), Mr. Roman Anatolyevitch Kolodkin (Russian Federation) and Mr. Teodor Viorel Melescanu (Romania) to fill the casual vacancies caused by the demise of Mr. Valery Kuznetsov and the election of Mr. Bruno Simma and Mr. Peter Tomka to the International Court of Justice.

4. At its 2770th meeting, on 7 July 2003, the Commission elected Mr. Michael Matheson (United States of America) to fill the casual vacancy caused by the resignation of Mr. Robert Rosenstock.

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[1] See para. 4.

[2] Ibid.

B. Officers and Enlarged Bureau

5. At its 2751st meeting, on 5 May 2003, the Commission elected the following officers:

Chairman: Mr. Enrique Candioti
First Vice-Chairman: Mr. Teodor Viorel Melescanu
Second Vice-Chairman: Mr. Choung Il Chee
Chairman of the Drafting Committee: Mr. James L. Kateka
Rapporteur: Mr. William Mansfield

6. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[3] and the Special Rapporteurs.[4]

7. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. T.V. Melescanu (Chairman), Mr. E.A. Addo, Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. C.I. Chee, Mr. C.J.R. Dugard, Mr. C.P. Economides, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. M. Koskenniemi, Mr. M.J. Matheson,[5] Mr. D. Opertti Badan, Mr. A. Pellet, Mr. P.S. Rao, Mr. V. Rodríguez Cedeño, Mr. R. Rosenstock,[6] Mr. B. Sepulveda, Mr. C. Yamada and Mr. W. Mansfield (ex officio).

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[3] Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. P.C.R. Kabatsi, Mr. A. Pellet, Mr. P.S. Rao, Mr. R. Rosenstock and Mr. C. Yamada.

[4] Mr. C.J.R. Dugard, Mr. G. Gaja, Mr. A. Pellet, Mr. P.S. Rao, Mr. V. Rodríguez Cedeño and Mr. C. Yamada.

[5] Supra, note 1.

[6] Ibid.

C. Drafting Committee

8. At its 2751st, 2753rd and 2764th meetings, on 5, 7 and 28 May 2003, respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) Reservations to treaties: Mr. J.L. Kateka (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. P. Comissario Afonso, Ms. P. Escarameia, Mr. S. Fomba, Mr. G. Gaja, Mr. M. Kamto, Mr. V. Rodriguez-Cedeño, Mr. R. Rosenstock, Ms. H. Xue, Mr. C. Yamada, and Mr. W. Mansfield (ex officio).

(b) Diplomatic Protection: Mr. J.L. Kateka (Chairman), Mr. C.J.R. Dugard, Mr. E. Addo, Mr. I. Brownlie, Ms. P. Escarameia, Mr. G. Gaja, Mr. Z. Galicki, Mr. P. Kabatsi, Mr. R.A. Kolodkin, Mr. M. Koskenniemi, Mr. D. Momtaz, Mr. Rodríguez Cedeño, Mr. R. Rosenstock, Mr. B. Sepulveda, Mr. C. Yamada and Mr. W. Mansfield (ex officio).

(c) Responsibility of international organizations: Mr. J.L. Kateka (Chairman), Mr. G. Gaja (Special Rapporteur), Mr. I. Brownlie, Mr. C.I. Chee, Mr. R. Daoudi, Mr. C. Economides, Ms. P. Escarameia, Mr. S. Fomba, Mr. M. Koskenniemi, Mr. R.A. Kolodkin, Mr. P.S. Rao, Mr. B. Sepulveda, Mr. C. Yamada and Mr. W. Mansfield (ex officio).

9. The Drafting Committee held a total of 11 meetings on the three topics indicated above.

D. Working Groups

10. At its 2756th, 2758th, 2762nd, 2769th and 2771st meetings, on 13, 16 and 23 May, 6 June and 8 July 2003, respectively, the Commission also established the following Open-ended Working Groups and Open-ended Study Group:

(a) Working Group on Responsibility of international organizations

Chairman: Mr. G. Gaja

(b) Working Group on Diplomatic Protection

Chairman: Mr. C.J.R. Dugard

(c) Working Group on International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

Chairman: Mr. P.S. Rao

(d) Working Group on Unilateral acts of States

Chairman: Mr. A. Pellet

(e) Study Group on Fragmentation of international law: Difficulties arising from the diversification and expansion of international law

Chairman: Mr. M. Koskenniemi

11. On 16 May 2003, the Planning Group re-established a Working Group on long-term programme of work composed of the following members: Mr. A. Pellet (Chairman), Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. M. Kamto, Mr. M. Koskenniemi, Ms. H. Xue and Mr. W. Mansfield (ex officio).

E. Secretariat

12. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Senior Legal Officer served as Senior Assistant Secretary, Mr. Trevor Chimimba, Mr. Renan Villacis and Mr. Arnold Pronto, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

13. At its 2751st meeting, on 5 May 2003, the Commission adopted an agenda for its fifty-fifth session consisting of the following items:

1. Filling of casual vacancies.
2. Organization of work of the session.
3. Diplomatic protection.
4. Reservations to treaties.
5. Unilateral acts of States.
6. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities).
7. Responsibility of international organizations.
8. Fragmentation of international law: difficulties arising from the diversification and expansion of international law.
9. Shared natural resources.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-sixth session.
13. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-FIFTH SESSION

14. With regard to the topic of Responsibility of international organizations, the Commission considered the Special Rapporteur's first report (A/CN.4/532) dealing with the scope of the work and general principles concerning responsibility of international organizations. The report proposed three draft articles which were considered by the Commission and were referred to the Drafting Committee. The Commission adopted articles 1 to 3 as recommended by the Drafting Committee together with commentaries (Chap. IV).

15. As regards the topic "Diplomatic Protection", the Commission considered the Special Rapporteur's fourth report,[7] covering draft articles 17 to 22 on the diplomatic protection of corporations and shareholders and of other legal persons. The Commission considered and referred draft articles 17 to 22 to the Drafting Committee. It further adopted draft articles 8 [10], 9 [11] and 10 [14], with commentaries, on the recommendation of the Drafting Committee (Chap. V).

16. Concerning the topic "International liability for injurious consequences arising out of acts not prohibited by international law" (International liability in case of loss from transboundary harm arising out of hazardous activities), the Commission considered the Special Rapporteur's first report,[8] concerning the legal regime for the allocation of loss. The report reviewed the work of the Commission in the previous years, analysed the liability regimes of various instruments and offered conclusions for the consideration of the Commission. The Commission established a Working Group to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission (Chap. VI).

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[7] A/CN.4/530 and Corr.1 (Spanish only) and Add.1.

[8] A/CN.4/531.

17. As regards the topic "Unilateral acts of States", the Commission considered the sixth report of the Special Rapporteur,[9] which focused on the unilateral act of recognition. The Commission also adopted the recommendations of the Working Group dealing with the definition of the scope of the topic and the method of work (Chap. VII).

18. Concerning the topic "Reservations to treaties", the Commission adopted 11 draft guidelines (with 3 model clauses) dealing with withdrawal and modification of reservations. The Commission also considered the Special Rapporteur's eighth report[10] and referred five draft guidelines dealing with withdrawal and modification of reservations and interpretative declarations to the Drafting Committee (Chap. VIII).

19. With regard to the topic "Shared natural resources", the Commission considered the first report of the Special Rapporteur.[11] The report, which was of a preliminary nature, set out the background to the subject and proposed to limit the scope of the topic to the study of confined transboundary groundwaters, oil and gas, with work to proceed initially on the study of confined transboundary groundwaters (Chap. IX).

20. In relation to the topic "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", the Study Group of the Commission established a schedule of work for the remaining part of the present quinquennium (2003-2006); agreed upon the distribution among its members of the preparation of the studies endorsed by the Commission in 2002;[12] decided upon the methodology to be adopted for the studies; and held a preliminary discussion of an outline by the Chairman of the question of "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" (Chap. X).

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[9] A/CN.4/534.

[10] A/CN.4/535 and Add.1.

[11] A/CN.4/533 and Add.1.

[12] *Official Records of the General Assembly, Fifty-seventh session, Supplement No. 10* (A/57/10), para. 512.

21. The Commission set up the Planning Group to consider its programme, procedures and working methods (Chap. XI, sect. A).

22. The Commission continued traditional exchanges of information with the International Court of Justice, the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law. Members of the Commission also held informal meetings with other bodies and associations on matters of mutual interest (Chap. XI, sect. C).

23. A training seminar was held with 24 participants of different nationalities (Chap. XI, sect. E).

24. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 3 May to 4 June and from 5 July to 6 August 2004 (Chap. XI, sect. B).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

25. In response to paragraph 11 of General Assembly resolution 57/21 of 19 November 2002, the Commission would like to indicate the following specific issues for some of the topics on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Responsibility of international organizations

26. Next year, in its study concerning international responsibility of international organizations, the Commission will address questions of attribution of conduct. Certain parallel issues relating to attribution of conduct to States are dealt with in articles 4 to 11 of the articles on responsibility of States for internationally wrongful acts. Article 4, paragraph 1, of those articles sets out as a general rule that "[t]he conduct of any State organ shall be considered an act of that State under international law". The following paragraph says that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State".

27. The Commission would welcome the views of Governments especially on the following questions:

(a) Whether a general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization";

(b) If the answer to (a) is in the affirmative, whether the definition of "rules of the organization", as it appears in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, is adequate;[13]

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[13] Article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations provides:

(c) The extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.

B. Diplomatic protection

28. The Special Rapporteur aims to submit his final report on diplomatic protection in 2004. This final report will deal with two miscellaneous items:

(a) The diplomatic protection of members of a ship's crew by the flag State (an issue considered by the Sixth Committee in 2002);

(b) The diplomatic protection of nationals employed by an intergovernmental international organization in the context of the *Reparation for Injuries* case.[14]

29. The Commission would welcome comments from Governments on whether there are any issues other than those already covered in the draft articles approved in principle by the Commission and the above two items which ought still to be considered by the Commission on the topic.

C. International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

30. The Commission would welcome comments from Governments on the different points raised by the Special Rapporteur referred to in paragraph 174 of the present report. In particular, they may wish to comment on the following issues:

(a) The procedural and substantive requirements that the State should place on an operator;

"rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

[14] *Reparations for Injuries Suffered in the Service of the United Nations*, 1949, *I.C.J. Reports*, p. 174.

(b) The basis and limits of allocation of loss to the operator;

(c) The types of supplementary sources of funding that might be considered to meet losses not covered by the operator;

(d) The nature and the extent of State funding and the steps that might or should be taken by States in respect of losses that are not covered by the operator or other sources of supplementary funding;

(e) Taking into consideration the scope of the topic, the extent to which damage to the environment per se, meaning damage not included in the concept of "damage" to persons, property including cultural property, the environment including landscape, and the natural heritage within and under the national sovereignty and jurisdiction and patrimony of a State, should or could be covered; and

(f) The final form of the work on this topic.

D. Unilateral acts of States

31. The debate in the Commission this year led to a redefinition of the scope of the topic. The Commission will continue to consider unilateral acts *stricto sensu*,[15] as it has been doing until now. In addition, however, it will begin its study of conduct of States which may produce legal effects similar to those of such unilateral acts, for the purpose of including guidelines or recommendations, if appropriate.

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[15] A unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law.

32. In this connection, the Commission would like to know the opinion of Governments on conduct of States which may come within the category of conduct that may, in certain circumstances, create obligations or produce legal effects under international law similar to those of unilateral acts *stricto sensu.*

33. The lack of information on State practice has been one of the main obstacles to progress on the study of the topic of unilateral acts. The Commission therefore once again requests Governments to provide information on general practice relating to unilateral acts and the unilateral conduct of States, along the lines of interest to the Commission.

E. Reservations to treaties

34. In chapter II of his eighth report, the Special Rapporteur proposed a definition of objections to reservations in order to fill a gap in the 1969 and 1996 Vienna Conventions, which do not contain such a definition. His proposal was based on the fact that objecting States or international organizations intend their statement to produce one or another of the effects provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions. He therefore proposed the following definition:

> Draft guideline 2.6.1 *Definition of objections to reservations*
>
> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

35. The proposed definition was regarded as being too narrow by some members of the Commission, whose view was that it did not take account of other categories of statements by which States express their opposition to reservations, while intending that their objections should produce various effects. Other members considered that the effects of objections to reservations under the Vienna Conventions were not very clear-cut and that it was better not to rely on the provisions of those Conventions in defining objections.

36. The Commission would be particularly interested in receiving the comments of Governments on this question and would be grateful to States for transmitting specific examples of objections which do not contain this (or an equivalent) term and which they nevertheless regard as genuine objections.

37. The Commission would like to know the views of States on the following position taken in 1977 by the arbitral tribunal that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case:

> "Whether … such [a negative] reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned."[16]

> Does this position reflect practice?

> If so, are there clear-cut examples of critical reactions to the reservation which can nonetheless not be characterized as objections?

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[16] *Reports of International Arbitral Awards, U.N.R.I.A.A.*, vol. XVIII, pp. 32-33, para. 39.

38. The Commission would also be grateful to Governments for comments on the advantages and disadvantages of clearly stating the grounds for objections to reservations formulated by other States or international organizations.

39. Draft guideline 2.3.5 (Enlargement of the scope of a reservation) gave rise to divergent positions. It was referred to the Drafting Committee. The views of Governments on this guideline would be particularly welcomed.[17]

F. Shared natural resources

40. The Commission would be focusing for the time being on groundwaters within the wider topic of shared natural resources. In the view of the Commission, it would be essential that it collect basic information on groundwaters in order to formulate appropriate rules in this area. Accordingly, the Commission would welcome information from Governments and international organizations on aspects of groundwaters with which they are concerned. Since the Commission has not yet made a final decision on the scope of groundwaters to be covered in the current study, it appreciates receiving information on the following issues with regard to major groundwaters, regardless of whether they are related to surface waters or whether they extend beyond national borders:

(a) Major groundwaters and their social and economic importance;

(b) Main uses of specific groundwaters and State practice relating to their management;

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[17] This draft guideline reads as follows:

> 2.3.5 *Enlargement of the scope of a reservation*
>
> The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3].

(c) Contamination problems and preventive measures being taken;

(d) National legislation, in particular the legislation of federal States that governs groundwaters across its political subdivisions together with information as to how such legislation is implemented;

(e) Bilateral and multilateral agreements and arrangements concerning groundwater resources in general and in particular those governing quantity and quality of groundwaters.

CHAPTER IV

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. Introduction

41. At its fifty-second session, in 2000, the Commission decided to include the topic "Responsibility of international organizations" in its long-term programme of work.[18] The General Assembly, in paragraph 8 of its resolution 55/152 of 12 December 2000, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus for the new topic annexed to the Commission's 2000 report. The Assembly, in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic "Responsibility of international organizations".

42. At its fifty-fourth session, the Commission decided, at its 2717th meeting, held on 8 May 2002, to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session, the Commission established a Working Group on the topic. The Working Group in its report[19] briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group.[20]

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[18] *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10* (A/55/10), chap. IX.1, para. 729.

[19] Ibid., chap. VIII.C, paras. 465-488.

[20] Ibid., chap. VIII.B, para. 464.

B. Consideration of the topic at the present session

43. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/532).

44. The first report of the Special Rapporteur surveyed the previous work of the Commission relating to the responsibility of international organizations beginning with the work of the Commission on the topic of relations between States and international organizations in which the question of responsibility of international organizations was identified as early as 1963.[21] This question was further referred to in the context of the work on the topic of State responsibility but it was then decided not to include it in that topic. The report explained that even though the topic of responsibility of international organizations was set aside, nevertheless some of the most controversial issues relating to responsibility of international organizations had already been discussed by the Commission in the context of its consideration of the topic which was eventually entitled "Responsibility of States for internationally wrongful acts". The Commission's work on State responsibility could not fail to affect the study of the new topic and it would be only reasonable to follow the same approach on issues that were parallel to those concerning States. Such an approach did not assume that similar issues between the two topics would necessarily lead to analogous solutions. The intention only was to suggest that, should the study concerning particular issues relating to international organizations produce results that did not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording.

45. In the first report the Special Rapporteur discussed the scope of the work and general principles concerning responsibility of international organizations, dealing with issues that corresponded to those that were considered in chapter one ("General principles", arts. 1 to 3) of

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[21] *Yearbook ... 1963*, vol. II, document A/CN.4/161 and Add.1, para. 172, p. 184.

the draft articles on "Responsibility of States for internationally wrongful acts". He proposed three draft articles: article 1 "Scope of the present draft articles",[22] article 2 "Use of terms"[23] and article 3 "General principles".[24]

46. The Commission considered the first report of the Special Rapporteur at its 2751st to 2756th and 2763rd meetings, held on 5 to 9, 13 and 27 May 2003.

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[22] Article 1 read as follows:

Scope of the present draft articles

"The present draft articles apply to the question of the international responsibility of an international organization for acts that are wrongful under international law. They also apply to the question of the international responsibility of a State for the conduct of an international organization."

[23] Article 2 read as follows:

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization which includes States among its members insofar it exercises in its own capacity certain governmental functions.

[24] Article 3 read as follows:

General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributed to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

47. At its 2756th meeting held on 13 May 2003, the Commission referred draft articles 1 and 3 to the Drafting Committee and established an open-ended Working Group to consider draft article 2.

48. At its 2763rd meeting, held on 27 May 2003, the Commission considered the report of the Working Group on draft article 2[25] and referred the text for that article as formulated by the Working Group to the Drafting Committee.

49. The Commission considered and adopted the report of the Drafting Committee on draft articles 1, 2 and 3, at its 2776th meeting held on 16 July 2003 (see section C.1 below).

50. At its 2784th meeting held on 4 August 2003, the Commission adopted the commentaries to the aforementioned draft articles (see section C.2 below).

51. At its 2776th meeting held on 16 July 2003, the Commission established an open-ended Working Group to assist the Special Rapporteur with regard to his next report. The Working Group held one meeting.

52. Bearing in mind the close relationship between this topic and the work of international organizations, the Commission at its 2784th meeting, on 4 August 2003, requested the Secretariat to circulate, on an annual basis, the chapter of the report of the Commission on this topic to the United Nations, its Specialized Agencies and some other international organizations for their comments.

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[25] The text of article 2 as proposed by the Working Group reads as follows:

> For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument of international law and possessing its own international legal personality [distinct from that of its members]. In addition to States, international organizations may include as members, entities other than States.

C. Text of draft articles on responsibility of international organizations provisionally adopted so far by the Commission

1. Text of draft articles

53. The text of draft articles provisionally adopted so far by the Commission is reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Article 1

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Article 2

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Article 3

General principles

1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

2. Text of the draft articles with commentaries thereto adopted at the fifty-fifth session of the Commission

54. Text of the draft articles with commentaries thereto adopted by the Commission at the fifty-fifth session are reproduced below.

RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

Article 1

Scope of the present draft articles

1. The present draft articles apply to the international responsibility of an international organization for an act that is wrongful under international law.

2. The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.

Commentary

(1) The definition of the scope of the draft articles in article 1 is intended to be as comprehensive and accurate as possible. While article 1 covers all the issues that are to be addressed in the following articles, this is without prejudice to any solution that will be given to those issues. Thus, for instance, the reference in paragraph 2 to the international responsibility of a State for the internationally wrongful act of an international organization does not imply that such a responsibility will be held to exist.

(2) For the purposes of the draft articles, the term "international organization" is defined in article 2. This definition contributes to delimiting the scope of the draft articles.

(3) An international organization's responsibility may be asserted under different systems of law. Before a national court, a natural or legal person will probably invoke the organization's responsibility or liability under one or the other municipal law. The reference in paragraph 1 of article 1 and throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law. Thus, issues of responsibility or liability under

municipal law are not as such covered by the draft articles. This is without prejudice to the applicability of certain principles or rules of international law when the question of an organization's responsibility or liability arises before a national court.

(4) Paragraph 1 of article 1 concerns the cases in which an international organization incurs international responsibility. The more frequent case will be that of the organization committing an internationally wrongful act. However, there are other instances in which an international organization's responsibility may arise. One may envisage, for example, cases analogous to those referred to in Chapter IV of Part One of the articles on Responsibility of States for internationally wrongful acts.[26] The international organization may thus be held responsible if it aids or assists another organization or a State in committing an internationally wrongful act, or if it directs and controls another organization or a State in that commission, or else if it coerces another organization or a State to commit an act that would be, but for the coercion, an internationally wrongful act. Another case in which an international organization may be held responsible is that of an internationally wrongful act committed by another international organization of which the first organization is a member.

(5) The reference in paragraph 1 to acts that are wrongful under international law implies that the draft articles do not consider the question of liability for injurious consequences arising out of acts not prohibited by international law. The choice made by the Commission to separate, with regard to States, the question of liability for acts not prohibited from the question of international responsibility prompts a similar choice in relation to international organizations. Thus, as in the case of States, international responsibility is linked with a breach of an obligation under international law. International responsibility may thus arise from an activity that is not prohibited by international law only when a breach of an obligation under international law occurs in relation to that activity, for instance if an international organization fails to comply with an obligation to take preventive measures in relation to a not prohibited activity.

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[26] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 150-169.

(6) Paragraph 2 includes within the scope of the present draft articles some issues that have been identified, but not dealt with, in the articles on responsibility of States for internationally wrongful acts. According to article 57 of these articles:

> "[they] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization".[27]

The main question that has been left out in the articles on State responsibility, and that will be considered in the present draft articles is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization.

(7) The wording of Chapter IV of Part One of the articles on the responsibility of States for internationally wrongful acts only refers to the cases in which a State aids, assists, directs, controls or coerces another State.[28] Should the question of similar conduct by a State with regard to an international organization not be regarded as covered, at least by analogy, in the articles on State responsibility, the present draft articles could fill the resulting gap.

(8) Paragraph 2 does not include questions of attribution of conduct to a State, whether an international organization is involved or not. Chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts deals, albeit implicitly, with attribution of conduct to a State when an international organization or one of its organs acts as a State organ, generally or only under particular circumstances. Article 4 refers to the "internal law of the State" as the main criterion for identifying State organs, and internal law will rarely include an international organization or one of its organs among State organs. However, article 4 does not consider the status of such organs under internal law as a necessary requirement.[29] Thus, an

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[27] Ibid., p. 360.

[28] Ibid., pp. 150-169.

[29] Ibid., p. 84.

organization or one of its organs may be considered as a State organ under article 4 also when it acts as a de facto organ of a State. An international organization may also be, under the circumstances, as provided for in article 5, a "person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority".[30] Article 6 then considers the case in which an organ is "placed at the disposal of a State by another State".[31] A similar eventuality, which may or may not be considered as implicitly covered by article 6, could arise if an international organization places one of its organs at the disposal of a State. The commentary on article 6 notes that this eventuality "raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of State responsibility".[32] International organizations are not referred to in the commentaries on articles 4 and 5. While it appears that all questions of attribution of conduct to States are nevertheless within the scope of State responsibility for its internationally wrongful acts, and should therefore not be considered anew, some aspects of attribution of conduct to either a State or an international organization may be further elucidated in the discussion of attribution of conduct to international organizations.

(9) The present draft articles will deal with the symmetrical question of a State or a State organ acting as an organ of an international organization. This question concerns the attribution of conduct to an international organization and is therefore covered by paragraph 1 of article 1.[33]

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[30] Ibid., p. 92.

[31] Ibid., p. 95.

[32] Ibid., para. (9) of the commentary to art. 6, p. 98.

[33] The Commission has not yet adopted a position on whether and to what extent the draft will apply to violations of what is sometimes called the "internal law of international organizations" and intends to take a decision on this question later. For the problems to which the concept of the "internal law of international organizations" gives rise, see para. (10) of the commentary to art. 3 below.

Article 2

Use of terms

For the purposes of the present draft articles, the term "international organization" refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.

Commentary

(1) The definition of "international organization" given in article 2 is considered as appropriate for the purposes of draft articles and is not intended as a definition for all purposes. It outlines certain common characteristics of the international organizations to which the following principles and rules on international organizations are considered to apply. The same characteristics may be relevant for purposes other than the international responsibility of international organizations.

(2) The fact that an international organization does not possess one or more of the characteristics outlined in article 2 and thus is not comprised within the definition set out for the purposes of the present draft articles does not imply that certain principles and rules stated in the following articles do not apply also to that organization.

(3) Starting from the Vienna Convention on the Law of Treaties of 23 May 1969,[34] several codification conventions have succinctly defined the term "international organization" as "intergovernmental organization".[35] In each case the definition was given only for the purposes of the relevant convention and not for all purposes. The text of some of these codification conventions added some further elements to the definition: for instance, the Vienna Convention

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[34] United Nations, *Treaty Series*, vol. 1155, p. 331. The relevant provision is article 2 (1) (i).

[35] See art. 1 (1) (1) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, A/CONF.67/16, art. 2 (1) (n) of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, United Nations, *Treaty Series*, vol. 1946, p. 3, and art. 2 (1) (i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, A/CONF.129/15.

on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 only applies to those intergovernmental organizations which have the capacity to conclude treaties.[36] No additional element would be required in the case of international responsibility apart from possessing an obligation under international law. However, the adoption of a different definition is preferable for several reasons. First, it is questionable whether by defining an international organization as an intergovernmental organization one provides much information: it is not even clear whether the term "intergovernmental organization" refers to the constituent instrument or to actual membership. Second, the term "intergovernmental" is in any case inappropriate to a certain extent, because several important international organizations have been established by State organs other than governments or by those organs together with governments, nor are States always represented by governments within the organizations. Third, an increasing number of international organizations comprise among their members entities other than States as well as States; the term "intergovernmental organization" would appear to exclude these organizations, although with regard to international responsibility it is difficult to see why one should reach solutions that differ from those applying to organizations of which only States are members.

(4) Most international organizations have been established by treaties. Thus, a reference in the definition to treaties as constituent instruments reflects prevailing practice. However, forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council, a treaty was subsequently concluded.[37] In other cases, although an implicit agreement may be held to exist, member States insisted that there was

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[36] See art. 6 of the Convention (in ibid.). As the Commission noted with regard to the corresponding draft articles:

> "Either an international organization has the capacity to conclude *at least* one treaty, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.", *Yearbook ... 1981*, vol. II (Part Two), p. 124.

[37] The text of the Treaty of Cooperation of 23 March 1962, as amended by an agreement of 3 February 1971, is reproduced in A.J. Peaslee (ed.), *International Governmental Organizations*, 3rd ed., Part I, The Hague: Nijhoff, 1974, pp. 1135-1143.

no treaty concluded to that effect, as for example in respect of the Organization for Security and Cooperation in Europe (OSCE).[38] In order to cover organizations established by States on the international plane without a treaty, article 2 refers, as an alternative to treaties, to any "other instrument governed by international law". This wording is intended to include instruments, such as resolutions adopted by the General Assembly of the United Nations or by a conference of States. Examples of international organizations that have been so established include the Pan American Institute of Geography and History (PAIGH),[39] the Organization of the Petroleum Exporting Countries (OPEC),[40] and OSCE.[41]

(5) The reference to "a treaty or other instrument governed by international law" is not intended to exclude entities other than States from being regarded as members of an international organization. This is unproblematic with regard to international organizations which, so long as they have a treaty-making capacity, may well be a party to a constituent treaty. The situation is likely to be different with regard to entities other than States and international organizations. However, even if the entity other than a State does not possess treaty-making capacity or cannot take part in the adoption of the constituent instrument, it may be accepted as a member of the organization so established.

(6) The definition in article 2 does not cover organizations that are established through instruments governed by municipal laws, unless a treaty or other instrument governed by international law has been subsequently adopted and has entered into force.[42] Thus the

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[38] At its Budapest session in 1995 the Conference for Security and Cooperation in Europe took the decision to adopt the name of Organization. *ILM*, vol. 34, 1995, p. 773.

[39] See A.J. Peaslee (ed.), supra, note 37, Part III and Part IV (The Hague/Boston/London: Nijhoff, 1979), pp. 389-403.

[40] See P.J.G. Kapteyn, P.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp, *International Organization and Integration* (The Hague: Nijhoff, 1984), II.K.3.2.a.

[41] Supra, note 38.

[42] This was the case of the Nordic Council, supra, note 37.

definition does not include organizations such as the World Conservation Union (IUCN), although over 70 States are among its members,[43] or the Institut du Monde Arabe, which was established as a foundation under French law by 20 States.[44]

(7) Article 2 also requires the international organization to possess "international legal personality". The acquisition of legal personality under international law does not depend on the inclusion in the constituent instrument of a provision such as Article 104 of the United Nations Charter, which reads as follows:

> "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

The purpose of this type of provision in the constituent instrument is to impose on the member States an obligation to recognize the organization's legal personality under their internal laws. A similar obligation is imposed on the host State when a similar text is included in the headquarters agreement.[45]

(8) The acquisition by an international organization of legal personality under international law is appraised in different ways. According to one view, the sheer existence for an organization of an obligation under international law implies that the organization possesses legal personality. According to another view, further elements are required. While the International Court of Justice has not identified particular prerequisites, its dicta on the legal

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[43] See http://www.iucn.org.

[44] A description of the status of this organization may be found in a reply by the Minister of Foreign Affairs of France to a parliamentary question. *Annuaire Français de Droit International*, vol. 37, 1991, pp. 1024-1025.

[45] Thus in its judgement No. 149 of 18 March 1999, *Istituto Universitario Europeo v. Piette*, *Giustizia civile*, vol. 49 (1999), I, p. 1309, at p. 1313 the Italian Court of Cassation found that "the provision in an international agreement of the obligation to recognize legal personality to an organization and the implementation by law of that provision only mean that the organization acquires legal personality under the municipal law of the contracting States".

personality of international organizations do not appear to set stringent requirements for this purpose. In its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* the Court stated:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[46]

In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court noted:

> "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence."[47]

While it may be held that, when making both these statements, the Court had an international organization of the type of the World Health Organization (WHO) in mind, the wording is quite general and appears to take a liberal view of the acquisition by international organizations of legal personality under international law.

(9) In the passages quoted in the previous paragraph, and more explicitly in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,[48] the Court appeared to favour the view that when legal personality of an organization exists, it is an "objective" personality. Thus, it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present draft articles. On the other hand, an organization merely existing on paper could not be considered as having an "objective" legal personality under international law.

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[46] *I.C.J. Reports*, 1980, p. 73 at pp. 89-90, para. 37.

[47] *I.C.J. Reports*, 1996, p. 66 at p. 78, para. 25.

[48] *I.C.J. Reports*, 1949, p. 185.

(10) The legal personality of an organization which may give rise to the international responsibility of that organization needs to be "distinct from that of its member States".[49] This element is reflected in the requirement in article 2 that the legal personality should be the organization's "own", a term that the Commission considers as synonymous with the phrase "distinct from that of its member States". The existence for the organization of a distinct legal personality does not exclude the possibility of a certain conduct being attributed both to the organization and to one or more of its members or to all its members.

(11) The second sentence of article 2 intends first of all to emphasize the role that States play in practice with regard to all the international organizations which are considered in the draft articles. This key role was expressed by the International Court of Justice, albeit incidentally, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, in the following sentence:

> "International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[50]

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[49] This wording was used by G.G. Fitzmaurice in the definition of the term "international organization" that he proposed in the context of the law of treaties, see *Yearbook ... 1956*, vol. II, p. 108, and by the Institut de Droit International in its 1995 Lisbon resolution on "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 445.

[50] Supra, note 47, p. 78, para. 25.

Many international organizations have only States as members. In other organizations, which have a different membership, the presence of States among the members is essential for the organization to be considered in the draft articles.[51] This requirement is intended to be conveyed by the words "in addition to States".

(12) The presence of States as members may take the form of participation as members by individual State organs or agencies. Thus, for instance, the Arab States Broadcasting Union, which was established by a treaty, lists "broadcasting organizations" as its full members.[52]

(13) The reference in the second sentence of article 2 of entities other than States - such as international organizations,[53] territories[54] or private entities[55] - as additional members of an organization points to a significant trend in practice, in which international organizations increasingly tend to have a mixed membership in order to make cooperation more effective in certain areas.

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[51] Thus, the definition in article 2 does not cover international organizations whose membership only comprises international organizations. An example of this type of organization is given by the Joint Vienna Institute, which was established on the basis of an agreement between five international organizations. See http://www.jvi.org.

[52] See art. 4 of the Convention of the Arab States Broadcasting Union. The text is reproduced in A.J. Peaslee, supra, note 37, Part V, The Hague/Boston/London: Nijhoff, 1976, p. 24 ff.

[53] For instance, the European Community has become a member of the Food and Agriculture Organization (FAO), whose Constitution was amended in 1991 in order to allow the admission of regional economic integration organizations. The amended text of the FAO Constitution may be found in P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.), supra, note 40, Supplement to volumes I.A-I.B, The Hague/Boston/London: Nijhoff, 1997, suppl. I.B.1.3.a.

[54] For instance, article 3 (d) (e) of the Constitution of the World Meteorological Organization (WMO) entitles entities other than States, referred to as "territories" or "groups of territories", to become members. Ibid., suppl. I.B.1.7.a.

[55] One example is the World Tourism Organization, which includes States as "full members", "territories or groups of territories" as "associate members" and "international bodies, both intergovernmental and non-governmental" as "affiliate members". See P.J.G. Kapteyn, R.H. Lauwaars, P.H. Kooijmans, H.G. Schermers and M. van Leeuwen Boomkamp (eds.) above, supra, note 40, vol. I.B, The Hague/Boston/London: Nijhoff, 1982, I.B.2.3.a.

(14) It is obvious that only with regard to States that are members of an international organization does the question of the international responsibility of States as members arise. Only this question, as well as the question of the international responsibility of international organizations as members of another organization will be considered in the draft articles. The presence of other entities as members of an international organization will be examined only insofar as it may affect the international responsibility of States and international organizations.

Article 3

General principles

> 1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
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> 2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
>
> (a) Is attributable to the international organization under international law; and
>
> (b) Constitutes a breach of an international obligation of that international organization.

Commentary

(1) Article 3 has an introductory character. It states general principles that apply to the most frequent cases occurring within the scope of the draft articles as defined in articles 1 and 2: those in which an international organization is internationally responsible for its own internationally wrongful acts. The statement of general principles in article 3 is without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a State or of another organization. Moreover, the general principles clearly do not apply to the issues of State responsibility referred to in article 1, paragraph 2.

(2) The general principles, as stated in article 3, are modelled on those applicable to States according to articles 1 and 2 of the articles on the responsibility of States for internationally

wrongful acts.[56] There seems to be little reason for stating these principles in another manner. It is noteworthy that in a report on peacekeeping operations the United Nations Secretary-General referred to:

> "the principle of State responsibility - widely accepted to be applicable to international organizations - that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization) entails the international responsibility of the State (or of the Organization) [...]".[57]

(3) The order and wording of the two paragraphs in article 3 are identical to those appearing in articles 1 and 2 of the articles on the responsibility of States for internationally wrongful acts, but for the replacement of the word "State" with "international organization". Since the two principles are closely interrelated and the first one states a consequence of the second one, it seems preferable to include them in a single article.

(4) As in the case of States, the attribution of conduct to an international organization is one of the two essential elements for an internationally wrongful act to occur. The term "conduct" is intended to cover both acts and omissions on the part of the international organization. The other essential element is that conduct constitutes the breach of an obligation under international law. The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization. Again as in the case of States, damage does not appear to be an element necessary for international responsibility of an international organization to arise.

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[56] Supra, note 26, pp. 63 and 68. The classical analysis that led the Commission to outline these articles is contained in Roberto Ago's Third Report on State Responsibility, *Yearbook ... 1971*, vol. II, pp. 214-223, paras. 49-75.

[57] Document A/51/389, p. 4, para. 6.

(5) When an international organization commits an internationally wrongful act, its international responsibility is entailed. One may find a statement of this principle in the advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court said:

> "[...] the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.
>
> "The United Nations may be required to bear responsibility for the damage arising from such acts."[58]

(6) The meaning of international responsibility is not defined in article 3, nor is it in the corresponding provisions of the articles on responsibility of States for internationally wrongful acts. There the consequences of an internationally wrongful act only result from Part Two of the text, which concerns the "content of the international responsibility of a State".[59] Also in the present draft articles the content of international responsibility will result from further articles.

(7) Neither for States nor for international organizations is the legal relationship arising out of an internationally wrongful act necessarily bilateral. The breach of the obligation may well affect more than one subject of international law or the international community as a whole. Thus in appropriate circumstances more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organization.

(8) The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an international organization may have cooperated with a State in the breach of an obligation imposed on both.

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[58] *I.C.J. Reports*, 1999, pp. 88-89, para. 66.

[59] Supra, note 26, p. 211 ff.

(9) The general principles as stated in article 3 do not include a provision similar to article 3 of the articles on the responsibility of States for internationally wrongful acts.[60] That article contains two sentences, the first one of which, by saying that "the characterization of an act of a State as internationally wrongful is governed by international law", makes a rather obvious statement. This sentence could be transposed to international organizations, but may be viewed as superfluous, since it is clearly implied in the principle that an internationally wrongful act consists in the breach of an obligation under international law. Once this principle has been stated, it seems hardly necessary to add that the characterization of an act as wrongful depends on international law. The apparent reason for the inclusion of the first sentence in article 3 of the articles on the responsibility of States lies in the fact that it provides a link to the second sentence.

(10) The second sentence in article 3 on State responsibility cannot be easily adapted to the case of international organizations. When it says that the characterization of an act as wrongful under international law "is not affected by the characterization of the same act as lawful by internal law", this text intends to stress the point that internal law, which depends on the unilateral will of the State, may never justify what constitutes, on the part of the same State, the breach of an obligation under international law. The difficulty in transposing this principle to international organizations depends on the fact that the internal law of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; some further parts of the internal law of the organization may be viewed as belonging to international law. One important distinction is whether the relevant obligation exists towards a member or a non-member State, although this distinction is not necessarily conclusive, because it would be questionable to say that the internal law of the organization

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[60] Ibid., p. 74.

always prevails over the obligation that the organization has under international law towards a member State. On the other hand, with regard to non-member States, Article 103 of the United Nations Charter may provide a justification for the organization's conduct in breach of an obligation under a treaty with a non-member State. Thus, the relations between international law and the internal law of an international organization appear too complex to be expressed in a general principle.

CHAPTER V

DIPLOMATIC PROTECTION

A. Introduction

55. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[61] In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[62] The Working Group submitted a report at the same session which was endorsed by the Commission.[63] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[64]

56. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

57. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

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[61] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and annex II, addendum 1.

[62] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[63] Ibid., para. 171.

[64] Ibid., paras. 189-190.

58. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[65] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[66]

59. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic,[67] after Mr. Bennouna was elected a judge to the International Criminal Tribunal for the Former Yugoslavia.

60. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[68] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

61. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)). Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred

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[65] A/CN.4/484.

[66] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 108.

[67] Ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 19.

[68] The report of the informal consultations is contained in ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the next session. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

62. At its 2688th meeting, the Commission established an open-ended Informal Consultation on article 9, chaired by the Special Rapporteur.

63. At its fifty-fourth session, in 2002, the Commission had before it the remainder of the second report of the Special Rapporteur (A/CN.4/514 and Corr.1 and 2 (Spanish only)), concerning draft articles 12 and 13, as well as his third report (A/CN.4/523 and Add.1), covering draft articles 14 to 16. The Commission decided to refer draft article 14, paragraphs (a), (b), (d) (to be considered in connection with paragraph (a)), and (e) to the Drafting Committee at its 2719th meeting, held on 14 May 2002. It further decided, at its 2729th meeting, held on 4 June 2002, to refer draft article 14, paragraph (c) to the Drafting Committee to be considered in connection with paragraph (a).

64. The Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8], at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. It adopted articles 1 to 3 [5] at its 2730th meeting, 4 [9], 5 [7] and 7 [8] at its 2731st meeting, and 6 at its 2732nd meeting. At its 2745th and 2746th meetings, held on 12 and 13 August 2002, the Commission adopted the commentaries to the aforementioned draft articles.

65. At its 2740th meeting, held on 2 August 2002, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

B. Consideration of the topic at the present session

66. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/530 and Corr.1 (Spanish only) and Add.1). The Commission considered the first part of the report, concerning draft articles 17 to 20, at its 2757th to 2762nd,

2764th and 2768th meetings, held from 14 May to 23 May, 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, held on 15, 16 and 18 July 2003.

67. At its 2762nd meeting, held on 23 May 2003, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, on article 17, paragraph 2. The Commission considered the report of the Working Group at its 2764th meeting, held on 28 May 2003.

68. At its 2764th meeting, the Commission decided to refer to the Drafting Committee article 17, as proposed by the Working Group, and articles 18, 19 and 20. At its 2777th meeting, the Commission decided to refer articles 21 and 22 to the Drafting Committee.

69. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting, held on 5 June 2003. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.

1. Article 17[69]

(a) Introduction by the Special Rapporteur

70. In introducing article 17, the Special Rapporteur observed that the subject of the diplomatic protection of legal persons was dominated by the 1970 judgment of the International

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[69] Article 17 reads:

Article 17

> 1. A State is entitled to exercise diplomatic protection in respect of an injury to a corporation which has the nationality of that State.
>
> 2. For the purposes of diplomatic protection, the State of nationality of a corporation is the State in which the corporation is incorporated [and in whose territory it has its registered office].

(A/CN.4/530 and Corr.1 (Spanish only) and Add.1).

Court of Justice in the *Barcelona Traction* case.[70] In that case, the Court had expounded the rule that the right of diplomatic protection in respect of an injury to a corporation belonged to the State under whose laws the corporation was incorporated and in whose territory it had its registered office, and not to the State of nationality of the shareholders. The Court had acknowledged further that there was some practice relating to bilateral or multilateral investment treaties that tended to confer direct protection on shareholders, but that did not provide evidence that a rule of customary international law existed in favour of the right of the State of nationality of shareholders to exercise diplomatic protection on their behalf. It had dismissed such practice as constituting *lex specialis*.

71. In reaching its decision, the Court had ruled on three policy considerations: (1) where shareholders invested in a corporation doing business abroad, they undertook risks, including the risk that the State of nationality of the corporation might in the exercise of its discretion decline to exercise diplomatic protection on their behalf; (2) permitting the State of nationality of shareholders to exercise diplomatic protection might result in a multiplicity of claims since shareholders could be nationals of many countries and shareholders might even be corporations; and (3) the Court declined to apply, by way of analogy, rules relating to dual nationality of natural persons to corporations and shareholders, which would allow the States of nationality of both to exercise diplomatic protection.

72. The Special Rapporteur recalled further that there had been widespread disagreement among judges over the Court's reasoning, as was evidenced by the fact that 8 of the 16 judges had given separate opinions, of which 5 had supported the right of the State of nationality of shareholders to exercise diplomatic protection. The decision of the Court had also been subjected to a wide range of criticisms, inter alia, that it had not paid sufficient attention to State practice; and that the Court had established an unworkable standard since, in practice, States

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[70] *Barcelona Traction, Light and Power Company Limited, Second Phase*, 1970, *I.C.J. Reports*, p. 3.

would not protect companies with which they had no genuine link. Indeed, in the view of some writers, the traditional law of diplomatic protection had been to a large extent replaced by dispute settlement procedures provided for in bilateral or multilateral investment treaties.

73. The Special Rapporteur observed that it was for the Commission to decide whether or not to follow the Court's judgment, given that decisions of the International Court of Justice were not necessarily binding on the International Law Commission and bearing in mind the different responsibilities of the two bodies. He observed further that, in the *ELSI* case,[71] although the chamber of the Court was there dealing with the interpretation of a treaty and not customary international law it had overlooked *Barcelona Traction* when it had allowed the United States of America to exercise diplomatic protection on behalf of two American companies which had held all the shares in an Italian company. At the same time, he acknowledged that *Barcelona Traction* was still viewed as a true reflection of customary international law on the subject and that the practice of States in the diplomatic protection of corporations was guided by it.

74. The Special Rapporteur identified seven options concerning which State would be entitled to exercise diplomatic protection: (1) the State of incorporation, as per the *Barcelona Traction* rule; (2) the State of incorporation and the State of genuine link; (3) the State of the siège social or *domicile*; (4) the State of economic control; (5) the State of incorporation and the State of economic control; (6) the State of incorporation, failing which the State of economic control; and (7) the States of nationality of all shareholders.

75. After considering all those options, he proposed that the Commission consider codifying the *Barcelona Traction* rule, subject to the exception recognized in the judgment. Article 17, paragraph 1 recognized the fact that, since the State was entitled to exercise diplomatic protection, it would be for the State to decide whether to do so or not. It was conceded that the discretionary nature of the right meant that companies that did not have a genuine link with the State of incorporation could go unprotected. However, that was a shortcoming which the Court itself had recognized, and which was why investors preferred the security of bilateral investment

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[71] *Elettronica Sicula S.p.A. (ELSI)*, 1989, *I.C.J. Reports*, p. 14.

treaties. Paragraph 2 sought to define the State of nationality for purposes of the draft articles. It was proposed that the State of nationality of a corporation was the State in which the corporation was incorporated. A possible additional reference could be made to "and in whose territory it has registered its office" which had also been considered in the *Barcelona Traction* decision. However, the two conditions were not strictly necessary.

(b) Summary of the debate

76. Members commended the Special Rapporteur on the quality of his report, and expressed their gratitude for the even-handed manner in which the options open to the Commission were presented.

77. The view was expressed that, regardless of their level of development, all States were dependent on foreign investment. International law must thus offer investors the necessary guarantees, and the Commission should seek to ensure that the law coincided with the facts while maintaining a balance between the interests of States and those of investors. It was against that background that the Commission was being asked to recognize the right of the State to exercise diplomatic protection on behalf of a corporation that had its nationality.

78. General support was expressed in the Commission for article 17, paragraph 1, based as it was on the *Barcelona Traction* judgment. This was held not to be contradicted in the *ELSI* case. It was noted that the choice of the State of nationality criterion was in accordance with article 3, adopted in 2002, designating the State of nationality as the State entitled to exercise diplomatic protection in the context of natural persons. Such a unified approach would make it possible to apply other rules to be formulated by the Commission to both natural and legal persons in respect of diplomatic protection. Indeed, it was proposed that paragraph 1 be further aligned with article 3, paragraph 1, adopted on first reading in 2002, as follows: "The State entitled to exercise diplomatic protection in respect of an injury to a corporation is the State of nationality of that corporation."

79. As regards paragraph 2, most members supported the Special Rapporteur's proposal to base the discussion on the rule in the *Barcelona Traction* case. It was observed that, despite its shortcomings, the judgment in that case was an accurate statement of the contemporary state of the law with regard to the diplomatic protection of corporations and a true reflection of customary international law.

80. Some members supported the wording of paragraph 2, but favoured deleting the second criterion in brackets. It was noted that the Court had made reference to both requirements since civil law countries tended to give relevance to the place of the registered office, whereas common law countries preferred the criterion of the place of incorporation. Yet, the Commission could accept the latter criterion in view of its growing dominance in other areas of law. It was also suggested that the commentary could explain that the other criterion was superfluous because a corporation's registered office was almost always located in the same State.

81. Other members preferred to retain both criteria. It was pointed out that the determination of the nationality of corporations was essentially a matter within States' domestic jurisdiction; although it is for international law to settle any conflict. Just as the nationality of individuals was determined by two main alternative criteria, *jus soli* and *jus sanguinis*, so too the nationality of corporations depended on two alternative systems, namely, place of incorporation and place of registered office, though many States borrowed to varying extents from one or the other system. However, caution was advised since some States did not apply either approach, or did not recognize the notion of nationality of corporations.

82. It was further suggested that, if the additional criterion in brackets were retained in the text, the conjunction "and" should be replaced by "or". Others preferred that the two conditions be cumulative. Still others expressed the concern that if the phrase were retained with the conjunction "and", the corporation whose registered office was located in a State other than the State of incorporation was in danger of losing the right to diplomatic protection on the grounds that it failed to meet both conditions. Alternatively, if the conjunction "and" was replaced by

"or", that could lead to dual nationality and competition between several States wishing to exercise diplomatic protection - and which would depart from the position taken by the Court in the *Barcelona Traction* case.

83. Other members suggested further consideration of the criterion of the domicile or *siège social*, which was the practice in international private law.

84. Some support was, however, expressed for the inclusion of a reference to the existence of an effective or genuine link between the corporation and the State of nationality. Indeed, it was pointed out that not including a reference to the genuine link criterion could have the effect of encouraging the phenomenon of tax havens, even indirectly.

85. It was subsequently pointed out that the Court in the *Barcelona Traction* case had not been required to rule on the issue of nationality, which had not been contested by the parties. The Court had referred to the principles of incorporation and registered office, but also to the company's other connections with the State of nationality. Hence, a sufficiently broad criterion of international law was needed to cover the various possibilities. It was suggested that article 17 should instead refer to the State where the company was incorporated and/or in whose territory it had its registered office and/or with which it had other appropriate links. Other suggestions included stating that diplomatic protection was exercised by the national State, such State to be determined by internal law in each case, provided that there was a genuine link or connection between the national State and the company concerned; and redrafting article 17 as follows: "A State according to whose law a corporation was formed and in which it has its registered office is entitled to exercise diplomatic protection as the State of nationality in respect of an injury to the corporation." Other suggestions included reformulating paragraph 2 to read "[f]or the purposes of diplomatic protection, the national State of a corporation is the State in which the corporation is incorporated or in which it has its registered office or its domicile, or in which it has its basic economic activity or any other element recognized by international law as reflecting the existence of a genuine link between the corporation and the State in question"; and reformulating the latter part of paragraph 2 to read "or which, in another way, recognizes the acquisition of its nationality by that corporation".

86. At the same time, caution was expressed about the introduction of the "genuine link" criterion - which was not accepted in the *Barcelona Traction* case - thereby introducing a test that would, in effect, be based on economic control as measured by majority shareholding. It was pointed out that a "genuine link" requirement would require the lifting of the "corporate veil", which would create difficulties not merely for courts but also for States of investment, which would have to decide whether to receive diplomatic representations or claims from States which believed that a company with which they had a genuine link had been injured. In addition, the complexity of determining the existence of an "appropriate" link when dealing with multinational corporations with a presence in numerous States, was referred to.

(c) Special Rapporteur's concluding remarks

87. The Special Rapporteur noted that most members had endorsed paragraph 1.

88. Regarding paragraph 2, he observed that the Commission had initially expressed general support for his approach, subject to differing views being expressed as to the inclusion of only one criterion as opposed to two for the determination of nationality of a corporation for purposes of diplomatic protection. However, the debate subsequently took a new turn with many members while supportive of the underlying idea in draft article 17, preferring formulations which emphasized formal links between the corporation and the State exercising diplomatic protection. While some of the proposals were cautious so as to avoid including a reference to the State of nationality of the shareholders, others went further and implied lifting the corporate veil in order to identify the State with which the corporation was most closely connected and which thus established the locus of the economic control of the corporation. He noted that while the latter approach would be difficult to reconcile with *Barcelona Traction*, it would be in line with the *Nottebohm* case, which emphasized the principle of the link with the State. However, as the Commission had not followed the *Nottebohm* test in draft article 3 with regard to natural persons, it might be illogical to do so for legal persons.

89. Furthermore, the problem of dual protection had been raised during the debate, i.e. where both the State of incorporation and the State of the *siège social* exercised diplomatic protection for the same corporation, a notion which had been supported by several judges in the

Barcelona Traction case. In its judgment in *Barcelona Traction*, however, the Court had clearly been hostile to the notion of dual protection or of a secondary right to protection in respect of the corporation and shareholders.

(d) Establishment of a Working Group

90. The Commission subsequently decided to establish an open-ended working group, chaired by the Special Rapporteur to consider article 17, before proceeding to take a decision on its referral to the Drafting Committee.

91. The Special Rapporteur subsequently reported on the outcome of the Working Group's consideration of the provision. He noted that the Working Group reached a consensus on the need, first of all, to cater for situations when a municipal system did not know the practice of incorporation, but applied some other system of creating a corporation and, secondly to establish some connection between the company and the State along the lines of the links enunciated by the International Court of Justice in the *Barcelona Traction* decision. At the same time, however, the Working Group had been careful not to adopt a formula which might suggest that the tribunal considering the matter should take into account the nationality of the shareholders that controlled the corporation.

92. The Working Group had agreed on the following formulation for article 17, and which the Special Rapporteur proposed to the Commission for referral to the Drafting Committee:

> For the purposes of diplomatic protection [in respect of an injury to a corporation], the State of nationality is [that according to whose law the corporation was formed]/[determined in accordance with municipal law in each particular case] and with which it has a [sufficient]/[close and permanent] [administrative]/[formal] connection.

2. Article 18[72]

(a) Introduction by the Special Rapporteur

93. The Special Rapporteur explained that draft article 18 dealt with exceptions to the general rule contained in article 17. The first exception, contained in paragraph (a) concerned the situation when the corporation had ceased to exist in the place of its incorporation. He noted that the phrase "ceased to exist", which had been used in the *Barcelona Traction* case, had not appealed to all writers, many preferring the lower threshold of intervention on behalf of the shareholders when the company was "practically defunct". His own view was that the first solution was probably preferable.

94. The second exception, in paragraph (b), provided for the State of nationality of the shareholders to intervene when a corporation had the nationality of the State responsible for causing the injury. It was not unusual for a State to insist that foreigners in its territory should do business there through a company incorporated under that State's law. If the State confiscated the assets of the company or injured it in some other way, the only relief available to that company at the international level was through the intervention of the State of nationality of its shareholders. However, as described in his report, the rule was not free from controversy.

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[72] Article 18 reads:

Article 18

> The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:
>
> (a) The corporation has ceased to exist in the place of its incorporation; or
>
> (b) The corporation has the nationality of the State responsible for causing injury to the corporation.

(A/CN.4/530 and Corr.1 (Spanish only) and Add.1).

95. The Special Rapporteur explained further that before the *Barcelona Traction* case, the existence of the second exception had been supported in State practice, arbitral awards and doctrine. In *Barcelona Traction*, the Court had raised the possibility of the exception and then had found that it was unnecessary for it to pronounce on the matter since it had not been a case in which the State of incorporation (Canada) had injured the company. Some support for the principle could be found in the Post-*Barcelona Traction* era, mainly in the context of the interpretation of investment treaties. In the *ELSI* case, a Chamber of the International Court of Justice had allowed the United States to protect American shareholders in an Italian company which had been incorporated and registered in Italy and had been injured by the Italian Government. The Chamber had not dealt with the issue in that case, but it had clearly been present in the minds of some of the judges. However, writers remained divided on the issue. He proposed that the Commission should accept the exception.

(b) Summary of the debate

96. General support was expressed for paragraph (a), although it was suggested that a time limit should be included, perhaps from the date on which the company announced bankruptcy. Other suggestions included deleting the phrase "in the place of its incorporation" and replacing the word "place" with "State".

97. Some members were of the views that the requirement that a corporation had "ceased to exist" might be too high a threshold, and that the test could be that of "practically defunct" or "deprived of the possibility of a remedy available through the company". In that way, the corporation would not have actually ceased to exist, but simply become non-functional, leaving no possibility of a remedy. Similarly, it was suggested that the words "de jure or de facto" could be inserted between "exist" and "in the place of". It was further suggested that the commentary make it clear that the phrase "ceased to exist" should be interpreted as involving situations where a company continued to exist even if it was in receivership. In terms of a further suggestion, the provision would say that diplomatic protection could be exercised on behalf of shareholders when "the possibility of a remedy available through the company" was ruled out; or when the company was no longer in fact in a position to act to defend its rights and interests.

98. Differing views were expressed as to the inclusion of the exception proposed in paragraph (b). Under one set of views, the exception was highly controversial, and potentially destabilizing, and therefore should not be included. The view was expressed that the authority for the exception was weak. It ignored the traditional rule that a State was not guilty of a breach of international law for injuring one of its own nationals. Concern was likewise expressed that granting the State of nationality of shareholders the right of action could result in long and complex proceedings and could lead to difficulties with the rule of continuity of nationality, given that shares changed hands quickly. Furthermore, in most cases, the State in which the corporation was incorporated provided a legal system, and hence a domestic remedy in situations of abuse. It was only in the extreme cases where those remedies had been exhausted and no justice obtained would paragraph (b) apply. Indeed, it was always open to an investor not to invest in a particular country. In addition, the view was expressed that the exception might jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State, thereby contravening the international rules governing treatment of foreigners. Similarly, it was pointed out that recent investment protection agreements provided effective legal remedies for investors in the case of any denial of justice or wrongdoing by the State of incorporation resulting in injury to the corporation.

99. Others referred to the policy rationale for inclusion of the exception raised by the Special Rapporteur, namely that it is not unusual for capital-importing States to require a foreign consortium wishing to do business in its territory to do so through the instrument of a company incorporated under its law. Reference was made to the concern expressed by the Government of the United Kingdom in the *Mexican Eagle* case that a requirement of incorporation under local law could lead to abuse in cases where the national State uses such incorporation as a justification for rejecting an attempt at diplomatic protection by another State. It would amount to limiting the "undoubted right [of foreign Governments] under international law to protect the commercial interests of their nationals abroad".[73] The exception in paragraph (b) was thus

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[73] M. Whiteman, *Digest of International Law*, vol. VIII, pp. 1272-1274.

designed to afford a measure of protection to such companies. It was recalled that the basic principle was reflected in many investment treaties concluded by many States of the international community, regardless of their level of development or ideological orientation. The view was also expressed that, even if it was still not fully ripe for codification, the exception should be considered favourably in the context of progressive development of international law.

100. It was suggested that if the exception were accepted, then a reference could be included to the economic control of the company, as expressed by majority shareholding. Others were of the view that such requirement would be complicated and possibly discriminatory. In terms of a further suggestion its scope of application could be limited to a situation in which the legislation of the host country requires the creation of a corporation.

101. In terms of a further suggestion, a requirement of a "reasonable time limit" for exercising diplomatic protection should be included. Others questioned the necessity of such a requirement.

(c) Special Rapporteur's concluding remarks

102. The Special Rapporteur observed that the first exception, contained in paragraph (a), had posed no particular problem, the majority of the Commission being in favour of it. However, several suggestions had been made for improving the provision, including imposing a time limit for bringing a claim. Since there had been no objection to article 18 (a), he recommended that it should be referred to the Drafting Committee.

103. Paragraph (b) had given rise to a much more vigorous debate and had divided the Commission. On balance, a majority of the Commission had favoured including article 18 (b). He believed that the exception was part of a cluster of rules and principles which together made up the decision of the International Court of Justice in the *Barcelona Traction* case. For that reason, he thought it should be included. As to whether the exception was part of customary international law or not, the Commission had likewise been divided. His own view was that a

customary rule was developing and that the Commission should be encouraged to engage in progressive development of the law in that area, if necessary. However, it should do so with great caution.

104. The Special Rapporteur noted further that several members of the Commission had argued that article 18 (b) was unnecessary because the shareholders had other remedies such as domestic courts, the International Centre for Settlement of Investment Disputes (ICSID) or the international tribunals provided for in some bilateral or multilateral agreements. However, that was not always true, either because there was no domestic remedy or because the State of nationality or the host State had not become a party to ICSID or to a bilateral investment treaty. Several members had also stressed that the exception contained in article 18 (b) should be used only as a final resort. He thought that that went without saying: it was not a remedy that should be used lightly and it should be resorted to only when there was no other solution. He accordingly recommended that article 18 (b) should be referred to the Drafting Committee.

3. Article 19[74]

(a) Introduction by the Special Rapporteur

105. The Special Rapporteur explained that article 19 was a savings clause designed to protect shareholders whose own rights, as opposed to those of the company, had been injured. As had been recognized by the Court in *Barcelona Traction*, the shareholders had an independent right

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[74] Article 19 reads:

Article 19

> Articles 17 and 18 are without prejudice to the right of the State of nationality of shareholders in a corporation to protect such shareholders when they have been directly injured by the internationally wrongful act of another State.

(A/CN.4/530 and Corr.1 (Spanish only) and Add.1).

of action in such cases and qualified for diplomatic protection in their own right. The Chamber of the International Court of Justice had also considered the issue in the *ELSI* case, but had not pronounced on rules of customary international law on that subject. The proposed article left two questions unanswered: first, the content of the right, or when such a direct injury occurred, and secondly, the legal order required to make that determination.

106. The Court in *Barcelona Traction* had mentioned the most obvious rights of shareholders, but the list was not exhaustive. That meant that it was left to courts to determine, on the facts of individual cases, the limits of such rights. Care would have to be taken to draw clear lines between shareholders' rights and corporate rights, however. He did not think it was possible to draft a rule on the subject, as it was for the courts to decide in individual cases.

107. As to the second question, it was clear that the determination of the law applicable to the question whether the direct rights of a shareholder had been violated had to be made by the legal system of the State in which the company was incorporated, although that legal order could be supplemented with reference to the general principles of international law. He had not wished to draft a new rule, but simply to restate the one recognized by the Court in the *Barcelona Traction* decision, namely, that in situations in which shareholders' rights had been directly injured, their State of nationality could exercise diplomatic protection on their behalf.

(b) Summary of the debate

108. Article 19 met with general approval in the Commission. The view was expressed that it presented no difficulties since it codified the most common situation, namely that of an individual shareholder whose subjective right had been harmed, and which corresponded to the general rules set forth in the part of the draft articles devoted to the diplomatic protection of natural persons.

109. It was suggested that the commentary consider the shareholders' own rights as distinct from the rights of the corporation. Such rights could, for example, include the right to control and manage the company. Indeed, it was suggested that the provision's scope should be defined

and a clear-cut distinction be drawn between the infringement of the rights of shareholders owing to injury suffered by the corporation and the direct infringement of the rights conferred on shareholders by statutory rules and company law, of which examples were given in the *Barcelona Traction* judgment.

110. It was queried whether, in a situation where a company ceased to exist because it had been nationalized and consequently it could not undertake any action on behalf of its shareholders before the local courts, the rights of the shareholders would be considered direct rights. Would the situation be governed by article 18 (b) or article 19?

111. It was suggested that article 19 could be viewed as yet another exception to the rule in article 17 - one which related to direct injury suffered by shareholders. Indeed, it was proposed that the provision could be incorporated into article 18. Others were of the view that since the question of diplomatic protection of the corporation did not arise, article 19 could not be considered to be an exception to article 17.

112. As to the legal order which would be called on to decide on the rights of shareholders, the view was expressed that it was for the laws of the State in which the corporation was incorporated to determine the content of those rights. Agreement was expressed with the proposal that attention be given to the possibility of invoking general principles of law in certain cases as some national systems might not define clearly what constituted a violation of those direct rights.

(c) Special Rapporteur's concluding remarks

113. The Special Rapporteur noted that article 19 had presented few problems. While some members had taken the view that it was an exception that would be better placed in article 18, he was persuaded that, with a view to conformity with the *Barcelona Traction* decision, the two articles should be kept separate.

4. Article 20[75]

(a) Introduction by the Special Rapporteur

114. In introducing article 20 on continuous nationality of corporations, the Special Rapporteur noted that State practice on the subject was mainly concerned with natural persons. He recalled that the Commission had adopted draft article 4 [9] on that subject at its fifty-fourth session in 2002. The principle was important in respect of natural persons in that they changed nationality more frequently and more easily than corporations. A corporation could change its nationality only by reincorporation in another State, in which case it changed its nationality completely, thus creating a break in the continuity of its nationality. It therefore seemed reasonable to require that a State should be entitled to exercise diplomatic protection in respect of a corporation only when it had been incorporated under its laws both at the time of injury and at the date of the official presentation of the claim.

115. If the corporation ceased to exist in the place of its incorporation as a result of an injury caused by an internationally wrongful act of another State, however, the question that arose was whether a claim had to be brought by the State of nationality of the shareholders, in accordance with article 18, paragraph (a), or by the State of nationality of the defunct corporation, or by both? He agreed with the view, expressed by some of the judges in *Barcelona Traction* that both

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[75] Article 20 reads:

Article 20

> A State is entitled to exercise diplomatic protection in respect of a corporation which was incorporated under its laws both at the time of the injury and at the date of the official presentation of the claim [; provided that, where the corporation ceases to exist as a result of the injury, the State of incorporation of the defunct company may continue to present a claim in respect of the corporation].

(A/CN.4/530 and Corr.1 (Spanish only) and Add.1).

States should be entitled to exercise diplomatic protection as it would be difficult to identify the precise moment of corporate death, and there would be a "grey area in time" during which a corporation was practically defunct, but might not have ceased to exist formally. In such a situation, both the State of incorporation of the company and the State of nationality of the shareholders should be able to intervene. He was aware that, in the *Barcelona Traction* case, the Court had not been in favour of such dual protection, but it seemed that that solution might be appropriate.

116. Finally, he did not think it was necessary to draft a separate rule on continuous nationality of shareholders; since they were natural persons, the provisions of article 4 [9] would apply to them.

(b) Summary of the debate

117. Support was expressed for draft article 20. The view was expressed that the draft articles should not, in principle, accord more favourable treatment in the matter of continuous nationality to legal persons than to natural persons.

118. In terms of another view, the difficulties with the rule of continuous nationality for natural persons also existed in the case of legal persons: by virtue of the very principle of the legal fiction on which diplomatic protection was based only the nationality of the protected person at the time of the internationally wrongful act was relevant. However, since the Commission had adopted a different position in article 4 [9], it would be inconsistent to adopt a different line of reasoning with respect to legal persons.

119. It was suggested that the exception provided in article 4, paragraph 2, in the context of natural persons should be equally extended to legal persons.

120. Support was expressed for retaining the bracketed portion of article 20 as it was a solution compatible with article 18, paragraph (a). However, it was observed that neither in article 18, paragraph (a), nor in article 20, was the corporation's having ceased to exist in law the

important element. What mattered more was that it should be actually and practically incapable of defending its rights and interests. Others were of the view that the provision in square brackets seemed to contradict article 18, paragraph (a) according to which the State of nationality of the corporation was no longer entitled to exercise diplomatic protection when the corporation had ceased to exist. Yet, under the proviso in article 20, the State of nationality was still eligible to exercise diplomatic protection on behalf of the defunct corporation. It was suggested, therefore, that the proviso be deleted. In terms of further suggestion, article 20 could be divided into two paragraphs, the second consisting of the bracketed part of the text, from which the words "provided that" would be deleted, and the phrase "with the exception provided in article 20, paragraph 2" could be added at the end of draft article 18, paragraph (a), after the word "incorporation".

121. Support was further expressed for the Special Rapporteur's position that it was unnecessary to draft a separate continuity rule for shareholders. However, it was not so clear that the continuity rule in respect of natural persons always covered shareholders. That was true only in some cases. In other, much more numerous cases, the shareholders of a corporation were corporate persons.

122. It was suggested that the phrase "which was incorporated under its laws" could be replaced by "which had its nationality", and "the State of incorporation of the defunct company" by "the State of nationality of the defunct company".

(c) Special Rapporteur's concluding remarks

123. The Special Rapporteur observed that there had been no serious objections to article 20. There had, however, been a division of opinion over the proviso. It had also been proposed that the text of the article should be harmonized with that of article 4 [9]. He consequently recommended that the article should be referred to the Drafting Committee.

5. Article 21[76]

(a) Introduction by the Special Rapporteur

124. In introducing article 21, the Special Rapporteur recalled that the fourth report on diplomatic protection had drawn attention to the fact that foreign investment was increasingly protected by some 2,000 bilateral investment treaties (BITs). Such agreements provided two routes for the settlement of disputes as alternatives to domestic remedies in the host State: (1) direct settlement of the investment dispute between the investor and the host State; and (2) settlement of an investment dispute by means of arbitration between the State of nationality of the investor, be it a corporation or an individual, and the host State, over the interpretation or application of the BIT agreement. The latter procedure was typically available in all cases, thereby reinforcing the investor-State dispute resolution procedure. Some States were also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[77] providing for tribunals established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID).

125. The Special Rapporteur explained that where the dispute settlement procedures provided for in a BIT or by ICSID are invoked, customary law rules relating to diplomatic protection are excluded. It was clear that the dispute settlement procedures in those two avenues offered greater advantages to the foreign investor than that offered under customary international law.

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[76] Article 21 reads:

Article 21

Lex specialis

> These articles do not apply where the protection of corporations or shareholders of a corporation, including the settlement of disputes between corporations or shareholders of a corporation and States, is governed by special rules of international law.

(A/CN.4/530 and Corr.1 (Spanish only) and Add.1).

[77] United Nations, *Treaty Series*, vol. 575, p. 159.

For example, in the case of customary international law there was always the inherent political uncertainty in the discretionary nature of diplomatic protection. In the case of BITs and ICSID, the foreign investor had direct access to international arbitration. The existence of the special agreements of this kind was acknowledged by the Court in the *Barcelona Traction* case, which tended to see such arrangements as *lex specialis*.

126. The purpose of article 21 was to make it clear that the draft articles did not apply to the special regime provided for in bilateral and multilateral investment treaties. The provision was modelled on article 55 of the draft articles on Responsibility of States for internationally wrongful acts.[78] It was observed that the commentary to article 55 noted that for the principle to apply "it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".[79]

127. It was the view of the Special Rapporteur that there was a clear inconsistency between the rules of customary international law on diplomatic protection of corporate investment, which envisaged protection only at the discretion of the national State, and only in respect of the corporation itself; and the special regime on foreign investment established by special treaties which conferred rights on the foreign investor directly, either as corporation or shareholder, which may be decided by an international tribunal. It was thus necessary to include such a provision in the draft articles.

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[78] Article 55 reads "[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or the implementation of the international responsibility of a State are governed by special rules of international law", see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76.

[79] Commentary to art. 55, para. (4), ibid., para. 77.

(b) Summary of the debate

128. Different views were expressed in the Commission regarding the necessity of including a provision on *lex specialis* in the draft articles. Three possibilities were discussed: (1) limiting the draft article to bilateral and multilateral treaties concerning the protection of investments; (2) reformulating it as a more general provision applicable to the entire draft articles; or (3) deleting it.

129. In terms of one set of views, there was merit in including such a provision, as it would clarify how the principle related to the draft articles, and would recognize the existence of the important regime of *lex specialis* that applies in the area of protection of investments. It was observed that many special rules exist in the field of diplomatic protection. Some exclude or defer such protection by providing a method for settlement of disputes that gives the investor a direct role. Other provisions modify the requirement of nationality of claims or derogate from the local remedies rule. In terms of a similar view, even though the inclusion of a *lex specialis* provision was not strictly necessary since it would apply as a general principle of law regardless of its inclusion in the draft articles, such inclusion would cause no harm and could be done *ex abundanti cautela*.

130. However, it was suggested that while most such special regimes may affect diplomatic protection of corporations or their shareholders, a provision on *lex specialis* should not be limited to the protection of corporations or their shareholders. Instead, it should have a wider scope and be placed among the final provisions of the draft articles. Indeed, the view was expressed that there was no reason not to give priority, for example, to human rights treaties in the context of the protection of natural persons.

131. Others expressed concern about giving the provision a broader application in relation to the draft articles as a whole. Indeed, it was pointed out that it could preclude the resort to diplomatic protection of natural persons where there exist "special" regimes for the protection of human rights, which are normally based on multilateral conventions, and usually do not expressly preclude the exercise of diplomatic protection. Extending the provision on *lex specialis* to cover natural persons could, therefore, create the impression that the possibility

of diplomatic protection is necessarily excluded by the existence of a regime on the protection of human rights. Instead, the two regimes are designed to complement each other. It was thus suggested that the provision stipulate that the *lex specialis* would only apply in its entirety and exclusively when it expressly states as much, otherwise the general rules of international law would also apply.

132. In terms of a further suggestion, the requirement of actual inconsistency between two provisions dealing with the same subject matter, and that of a discernible intention that one provision excludes the other could be included in the text of draft article 21 itself. Reference was made to a difference between article 21 and article 55, of the articles on Responsibility of States for internationally wrongful acts, adopted in 2001, namely that the general rule should not apply not only where, but also "to the extent", that the question of diplomatic protection is governed by special rules of international law. Others pointed out that the provision was different from article 55, which dealt with cases of contradiction between the general rule and the special rule. Instead, article 21 established a principle of preference: for corporations the preference would be given to the special procedure which would have precedence over the general rules. It was thus suggested that the provision be recast as a rule of priority, so that diplomatic protection would not be entirely ruled out. A view was also expressed that a regime of priority could not be presumed, and that a "special regime" could not always be seen as the remedy that needed to be exhausted before diplomatic protection could apply.

133. In terms of a further suggestion, the basic approach to be followed was to recognize, either in the draft articles or in the commentary, that there exist important special regimes for the protection of investment, including but not limited to BITs, and that the purpose of the draft articles was not to supersede or modify those regimes. Such approach would leave open the possibility that rules of international customary law could still be used in those contexts to the extent that they were not inconsistent with those regimes.

134. Additional suggestions for reformulating the provision included recasting it as a conditional exclusion, specifying its content and scope of application, more closely aligning it to the terminology used in investment treaties, and deleting the words "*lex specialis*" in the title.

135. Conversely, others expressed doubts about the necessity of including a provision on *lex specialis* at all. It was pointed out that the provision might not be necessary if the *lex specialis* is based only on treaty provisions. The view was also expressed that such a provision tended to give the false impression of an "either or" world, where the rules of diplomatic protection either apply completely or not at all. For example, where there is a relevant regime, such as a human rights regime, then all of diplomatic protection would be excluded immediately (which would be incorrect). In addition, inserting such a provision in texts produced by the Commission also risked creating the incorrect *a contrario* impression that a convention which makes no mention of the *lex specialis* rule was intended to have a special "non-derogable" status. A preference was thus expressed for deleting the article entirely and dealing with the issue in the commentary.

(c) Special Rapporteur's concluding remarks

136. The Special Rapporteur recalled that he had proposed article 21 for two reasons: (1) to follow the example of the draft articles on Responsibility of States for internationally wrongful acts; and (2) out of a need to take into account the fact that BITs expressly aim to avoid the regime of diplomatic protection because of its discretionary nature, and also so as to confer rights on the State of nationality of the shareholders. However, following the debate, he was no longer certain on both counts. He agreed that there was no need to follow the draft articles on Responsibility of States for internationally wrongful acts blindly, and was persuaded by the argument that BITs do not intend to exclude customary international law completely. Indeed, it was often the intention of parties that recourse should be had to customary international law in order to fill in the gaps of the regime, to guide tribunals when it comes to the interpretation of those treaties. Insofar as article 21 suggested that the BITs regime excluded customary rules, it was both inaccurate and possibly dangerous. If it was to be retained it would have to be amended to drop the title "*lex specialis*", and reformulated along the lines suggested during the debate.

137. The Special Rapporteur further recalled that the other criticism directed against article 21 was that there was no reason to limit it to BITs. Other special regimes existed, for example, in treaties which exclude the exhaustion of local remedies rule, regimes which cover human rights

standards, and which might complement or replace diplomatic protection. He noted, in that regard, the suggestion that the article be recast as a general provision to be included at the end of the draft articles. However, he cautioned against such approach which could support the view that diplomatic protection might be excluded by a human rights treaty, when in fact, diplomatic protection might offer a more effective remedy. In his view, if the individual's rights are to receive the maximum protection, the individual should be able to invoke all regimes.

138. On reflection and in light of the concerns raised during the debate, he proposed that the Commission consider deleting article 21, leaving the issue to the commentary.

139. However, the Commission decided to refer the provision to the Drafting Committee with a view to having it reformulated and located at the end of the draft articles, for example, as a "without prejudice" clause.

6. Article 22[80]

(a) Introduction by the Special Rapporteur

140. The Special Rapporteur explained that the purpose of article 22 was to apply the rules expounded in respect of corporations to other legal persons, allowing for the changes that must be made as a result of the different structures, aims and nature of those other legal persons. The Special Rapporteur observed that such other legal persons may also require diplomatic protection. Several decisions of the Permanent Court of International Justice had stressed the fact that other institutions might have legal personality which might result in diplomatic protection. There was no reason why a State should not protect, for example, a university if it is

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[80] Article 22 reads:

Article 22

Legal persons

> The principles contained in articles 17 to 21 in respect of corporations shall be applied mutatis mutandis to other legal persons.

(A/CN.4/530 and Corr.1 (Spanish only) and Add.1).

injured abroad, provided it is entirely a private university. In the case of injury to a publicly-funded or state-controlled university, the injury would be a direct injury to the State. He referred further to the example of foundations and non-governmental organizations which were increasingly involved in philanthropic work abroad in the fields of health, welfare, human rights, women's rights etc. In his view, such foundations and non-governmental organizations (despite some academic views to the contrary) should be protected abroad.

141. He noted that it was not possible to draft articles dealing with the diplomatic protection of every kind of legal person other than the corporation. The difficulty was that there was no consistency or uniformity among legal systems for the creation of a person by law, resulting in a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit associations, non-governmental organizations, and even, in some countries, partnerships. The impossibility of finding common or uniform features in all of those legal persons provided one explanation for the fact that writers on both public and private international law tended to focus their attention on the corporation. The other reason was that it was the corporation that engaged in international trade and foreign investment, resulting in the fact that most of the jurisprudence on the subject related to investment disputes concerning the corporation rather than other legal persons. The complexity of the issue was illustrated by the partnership: in most legal systems, particularly common-law systems, partnerships are not legal persons. In some, however, partnerships are conferred with legal personality. Therefore, a partnership could be considered a legal person in one State but not in another.

142. In such circumstances, the only way forward was to focus attention on the corporation, and then to insert a general clause as in article 22, which applied the principle expounded in regard to corporations mutatis mutandis to other legal persons. He noted further that most cases involving the diplomatic protection of legal persons other than corporations would be covered by draft articles 17 and 20, and that articles 18 and 19, dealing with the case of the protection of shareholders, would not apply to legal persons other than corporations.

(b) Summary of the debate

143. Support was expressed for the view that it would not be possible to draft further articles dealing with the diplomatic protection of each kind of legal person. The main difficulty of such approach was the infinite variety of forms legal persons may take, each depending on the internal legislation of States. The view was also expressed that there was some practical value in retaining the provision, by way of a marker that such cases, however rare, do exist, as shown by the *Peter Pázmány* case.[81]

144. While support was expressed for the inclusion of the expression mutatis mutandis, as it had become accepted legal usage, the view was also expressed that it would not entirely resolve the problem. It was pointed out that the difficulty was that it conveyed little about the circumstances that would entail the application of a different rule, and also about the contents of that different rule, i.e. what would prompt the change and what that change would be. Hence, a preference was expressed for a positive rule dealing with legal persons other than corporations, which would be based on an analysis of State practice. The following formulation was proposed, "the State entitled to exercise diplomatic protection of a legal person other than a corporation is the State under whose law the legal personality has been granted, provided that the place of management is located or registration takes place in the territory of the same State".

145. In terms of another proposal, a requirement of mutual recognition of the legal personality of a given entity by the States concerned would be included in the text. Others maintained that only the recognition by the State presenting the claim for diplomatic protection should be required, because, if mutual recognition were necessary, a State which did not recognize certain entities, like non-governmental organizations, would then be free to do whatever it wanted to them. Indeed, it was recalled that such mutual recognition requirement was not included in the context of corporations. In terms of a further view, the common aspect of any legal person is an attribute of being the bearer of rights and obligations. If in internal law an entity has been designated as a legal person, it would suffice for the international legal order which would have

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[81] *Appeal from a Judgment of the Czechoslovak-Hungarian Mixed Arbitral Tribunal (Peter Pázmány University v. Czechoslovakia), P.C.I.J. Reports, Series A/B*, No. 61, p. 208.

to take that into account for purposes of diplomatic protection. Others suggested that it might be left to the State to determine whether it wishes to exercise diplomatic protection regarding the legal person or not.

146. Some members expressed concern about the resort to diplomatic protection by States for the benefit of legal persons other than corporations, such as non-governmental organizations the establishment and functioning of which were generally governed by the domestic law of those States. It was recalled that the act of exercising diplomatic protection was essentially a political decision, and it was maintained that it was possible that a State could be inclined to support a legal person, which was established in its territory, against another State with whom it did not maintain cordial relations. A preference was thus expressed for clear language in article 22 indicating whether non-governmental organizations could enjoy such protection or not. Indeed, support was expressed for the view that, in most cases, non-governmental organizations do not enjoy sufficient links with the State of registration to allow for such State to exercise diplomatic protection. Some other members expressed the view that diplomatic protection extended to all other legal persons, including non-governmental organizations, and that in any case States had the discretionary right to protect their own nationals.

147. Others expressed doubts about including the provision at all, since there was insufficient legal material, including evidence of State practice, to elaborate draft rules of diplomatic protection of legal persons other than corporations. Concern was also expressed that article 22 involved issues far more complex than were apparent at first glance, and that the assimilation of such other legal persons to corporations and shareholders was very difficult. it was proposed that the matter could instead be the subject of a separate study.

148. In terms of other suggestions, it was noted that the reference to articles 17 to 21 was inaccurate, since articles 18 and 19 do not apply. Instead, the provision should simply state "in articles 17 and 20". Furthermore, the title could read "other legal persons". Others queried the necessity of referring to "principles".

(c) Special Rapporteur's concluding remarks

149. The Special Rapporteur observed that there was little State practice on the circumstances in which a State would protect legal persons other than a corporation. Corporations are the legal person which most frequently engage in international commerce, and for this reason they feature most prominently in international litigation. The question was what to do with the situation where there was little or no State practice, while at the same time addressing the real need to deal with legal persons other than corporations in the draft articles. He recalled that, during the debate on the protection of corporations, some members of the Commission had raised the question of the protection of other legal persons. Similar questions would be asked in the Sixth Committee and in the international legal community if no provision was included in the draft articles. In his view, it was not appropriate to avoid the subject simply because there was not enough State practice. A provision had to be included on the subject, either because it dealt with a general principle of the kind contained in the *Barcelona Traction* case, or because it may be used by way of an analogy, or by way of progressive development.

150. The Special Rapporteur noted that several members had expressed difficulties in respect of non-governmental organizations. He clarified that it was not his intention to deal with the status of such entities in the draft articles. Instead, the approach was merely to recognize that if the problem arises, one should look to the principles of the diplomatic protection of corporations and apply them mutatis mutandis. He noted that, subject to several drafting suggestions, the majority of the Commission seemed to support this approach, as well as the inclusion of the expression mutatis mutandis.

151. It was thus proposed that the Commission refer the draft article to the Drafting Committee with a view to drafting a flexible provision which would be open to developments in practice on the application of diplomatic protection to other legal persons.

C. Text of draft articles on diplomatic protection provisionally adopted so far by the Commission

1. Text of draft articles

152. The text of draft articles provisionally adopted so far by the Commission is reproduced below.

DIPLOMATIC PROTECTION

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

1. Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

2. Diplomatic protection may be exercised in respect of a non-national in accordance with article 7 [8].[82]

Article 2 [3][83]

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with these articles.

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[82] This paragraph will be reconsidered if other exceptions are included in the draft articles. For commentary see A/57/10, pp. 169-171.

[83] The numbers in square brackets are the numbers of the articles as proposed by the Special Rapporteur. For commentary see ibid., pp. 172-173.

PART TWO

NATURAL PERSONS

Article 3 [5][84]

State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Article 4 [9][85]

Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

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[84] Article 3 [5] will be reviewed in connection with the Commission's consideration of the diplomatic protection of legal persons. For commentary see ibid., pp. 173-177.

[85] For commentary see ibid., pp. 178-181.

Article 5 [7][86]

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 6[87]

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Article 7 [8][88]

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

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[86] For commentary see ibid., pp. 181-183.

[87] For commentary see ibid., pp. 183-187.

[88] For commentary see ibid., pp. 188-192.

Article 8 [10][89]

Exhaustion of local remedies

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8][90] before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Article 9 [11][89]

Category of claims

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].[90]

Article 10 [14][89]

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(*d*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.[91]

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[89] Articles 8 [10], 9 [11] and 10 [14] are to be included in a future Part Four to be entitled "Local Remedies", and will be renumbered. For commentary see section C.2 below.

[90] The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles. For commentary see section C.2 below.

[91] Paragraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver". For commentary see section C.2 below.

2. Text of the draft articles with commentaries thereto adopted at the fifty-fifth session of the Commission

153. The texts of draft articles 8 [10], 9 [11] and 10 [14] with commentaries thereto adopted by the Commission at its fifty-fifth session, are reproduced below.

DIPLOMATIC PROTECTION

Article 8 [10][92]

Exhaustion of local remedies

> 1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8][93] before the injured person has, subject to article 10 [14], exhausted all local remedies.
>
> 2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

Commentary

(1) Article 8 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"[94] and by a Chamber of the International Court in the *Elettronica Sicula* (*ELSI*) case as "an important principle of customary international law".[95]

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[92] Articles 8 [10], 9 [11] and 10 [14] are to be included in a future Part Four to be entitled "Local Remedies", and will be renumbered.

[93] The cross-reference to article 7 [8] will be considered further if other exceptions to the nationality rule are included in the draft articles.

[94] *Interhandel* case (*Switzerland* v. *United States of America*) (Preliminary objections) 1959 *I.C.J. Reports* p. 6 at p. 27.

[95] *Case concerning Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America* v. *Italy*), judgment, 1989 *I.C.J. Reports* p. 15 at p. 42, para. 50.

The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".[96] The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.[97]

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies where it engages in *acta jure gestionis*. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in article 7 [8], are also required to exhaust local remedies.

(3) Paragraph 1 refers to the bringing of a claim rather than the presentation of the claim as the word "bring" more accurately reflects the process involved than the word "present" which suggests a formal act to which consequences are attached and is best used to identify the moment in time at which the claim is formally made.

(4) The phrase "all local remedies" must be read subject to article 10 [14] which describes the exceptional circumstances in which local remedies need not be exhausted. Suggestions that reference be made in this provision to the need to exhaust only "adequate and effective" local remedies were not followed for two reasons. First, because such a qualification of the requirement that local remedies be exhausted needs special attention in a separate provision.

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[96] *Interhandel* case, supra, note 94 at p. 27.

[97] Article 22 on First Reading. See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.7), chap. III D 1; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50; article 44 on Second Reading: *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) pp. 304-307.

Secondly, the fact that the burden of proof is generally on the respondent State to show that local remedies are available, while the burden of proof is generally on the applicant State to show that there are no effective remedies open to the injured person,[98] requires that these two aspects of the local remedies rule be treated separately.

(5) The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of remedies that must be exhausted.[99] In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Courts in this connection include both ordinary and special courts since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".[100]

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[98] The question of burden of proof was considered by the *Special Rapporteur* in the Third Report on Diplomatic Protection; A/CN.4/523 and Add.1, paras. 102-118. The Commission decided not to include a draft article on this subject: *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10) paras. 240-252. See also the *Elettronica Sicula* (*ELSI*) case, supra, note 95 at pp. 46-48 (paras. 59-63).

[99] In the *Ambatielos Claim* the arbitral tribunal declared that "[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test": (1956) *U.N.R.I.A.A.*, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, 1990.

[100] *B. Schouw Nielsen v. Denmark*, Application No. 343/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights*, p. 412 at 438 (referring to the consideration of the Institute of International Law in its resolution of 1954 (Annuaire, 1956, vol. 46, p. 364)). See also *Lawless* case, Application No. 332/57 (1958-9), 2 *Yearbook of the European Convention on Human Rights*, p. 308 at pp. 318-322.

Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which lie as of right and may result in a binding decision, in accordance with the maxim *ubi jus ibi remedium*. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies as of grace[101] or those whose "purpose is to obtain a favour and not to vindicate a right".[102]

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise all the arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of the International Court of Justice stated that:

> "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".[103]

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

> "all the contentions of fact and propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts".[104]

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[101] Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War ("*Finnish Ships Arbitration*") 1934, 3 *U.N.R.I.A.A.*, vol. III, 1479.

[102] *De Becker* v. *Belgium*, Application No. 214/56, 1958-9, 2 *Yearbook of the European Convention on Human Rights* p. 214 at 238.

[103] Supra, note 95 at para. 59.

[104] Supra, note 101 at 1502.

(7) The foreign litigant must therefore produce the evidence available to him to support the essence of his claim in the process of exhausting local remedies.[105] He cannot use the international remedy afforded by diplomatic protection to overcome faulty preparation or presentation of his claim at the municipal level.[106]

Article 9 [11][92]

Category of claims

> Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].[93]

Commentary

(1) The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national.[107] It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.

(2) In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before international courts have presented the phenomenon of the mixed claim. In the *Hostages* case,[108] there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its

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[105] *Ambatielos Claim,* supra, note 99, p. 120.

[106] D.P. O'Connell, *International Law*, vol. 2, p. 1059.

[107] This accords with the principle expounded by the Permanent Court of International Justice in the *Mavrommatis Palestine Concession* case that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right - its right to ensure, in the person of its subjects, respect for the rules of international law": 1924, *P.C.I.J., Series A, No. 2*, p. 12.

[108] *United States Diplomatic and Consular Staff in Tehran* case, (*United States v. Iran*) 1980, *I.C.J. Reports*, 3.

diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case,[109] there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies.

(3) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

> "the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]".[110]

Closely related to the preponderance test is the sine qua non or "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the "but for" test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances the Commission preferred to adopt one test only - that of preponderance.

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[109] Supra, note 94.

[110] Supra, note 95, p. 43, para. 52. See, also, the *Interhandel* case, supra, note 94, p. 28.

(4) Other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a diplomatic official[111] or State property[112] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national the claim will be indirect.

(5) Article 9 [11] makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,[113] there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.[114] Article 9 [11] makes it clear that a request for a declaratory judgment per se is not exempt from the exhaustion of local remedies rule. Where the request for declaratory judgment is incidental to or related to a claim involving injury to a national - *whether linked to a claim for compensation or restitution on behalf of the injured national or not* - it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgment is preponderantly brought on the basis of an injury to the national. Such a

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[111] *Hostages* case, supra, note 108.

[112] *Corfu Channel* case, (*United Kingdom v. Albania*) (Merits) 1949 *I.C.J. Reports*, p. 4.

[113] Case concerning the *Air Services Agreement, France v. United States of America*, 1978 *U.N.R.I.A.A.*, vol. XVIII 415; *Applicability of the Obligation to Artbitrate under Section 21 of the United Nations Headquarters Agreement*, 1988 *I.C.J. Reports*, p. 29, para. 41.

[114] See *Interhandel*, supra, note 94, pp. 28-29; *ELSI*, supra, note 95, p. 43.

decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgment in order to avoid compliance with the local remedies rule.

Article 10 [14][92]

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

(*b*) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

(*d*) The State alleged to be responsible has waived the requirement that local remedies be exhausted.[115]

Commentary

(1) Article 10 [14] deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (c), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a pre-condition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (d) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule. As this exception is not of the same character as those contained in paragraphs (a) to (c) it may be necessary, at a later stage, to provide for this situation in a separate provision.[116]

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[115] Paragraph (d) may be reconsidered in the future with a view to being placed in a separate provision entitled "Waiver".

[116] Ibid.

Paragraph (a)

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the "futility" or "ineffectiveness" exception. The Commission considered three options for the formulation of a rule describing the circumstances in which local remedies need not be exhausted:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of an effective redress.

All three of these options enjoy some support among the authorities.

(3) The Commission considered the "obvious futility" test, expounded by Arbitrator Bagge in the Finnish Ships Arbitration,[117] but decided that it set too high a threshold. On the other hand, the Commission took the view that the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions,[118] was too generous to the claimant. It therefore preferred the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case[119] and is supported by the writings of jurists.[120] Moreover, it accords with judicial decisions which

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[117] Supra, note 101, at p. 1504.

[118] *Retimag S.A. v. Federal Republic of Germany*, Application No. 712/60, 4 *Yearbook of the European Convention on Human Rights*, p. 385 at p. 400; *X, Y and Z v. UK*, Application Nos. 8022/77, 8027/77, 18 *European Commission of Human Rights, Decisions and Reports*, p. 66 at p. 74. See, too, the commentary to article 22 of the draft articles on State Responsibility adopted by the Commission on first reading: *Yearbook ... 1977*, vol. II (Part Two) p. 47, para. 48.

[119] 1957 *I.C.J. Reports*, 9 at p. 39.

[120] See Third Report on Diplomatic Protection of 2002, A/CN.4/523 and Add.1, para. 35.

have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;[121] the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;[122] the local courts are notoriously lacking in independence;[123] there is a consistent and well-established line of precedents adverse to the alien;[124] the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;[125] or the respondent State does not have an adequate system of judicial protection.[126]

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[121] *Panevezys-Saldutiskis Railway* case, 1939 *P.C.I.J. Series A/B*, No. 76, p. 4 at p. 18, *Arbitration under Article 181 of the Treaty of Neuilly*, reported in, 1934, 28 *A.J.I.L.* p. 760 at p. 789; Claims of R. Gelbtrunk and "Salvador Commercial Co." et al., 1902 *U.N.R.I.A.A.*, vol. XV, p. 467 at pp. 467-477; *"The Lottie May" Incident*, Arbitration between Honduras and the United Kingdom, 1899 *U.N.R.I.A.A.*, vol. XV, p. 29 at p. 31; Judge Lauterpacht's separate opinion in the *Norwegian Loans* case, supra, note 119, pp. 39-40; *Finnish Ships Arbitration*; supra, note 101, p. 1535.

[122] *Arbitration under Article 181 of the Treaty of Neuilly*, supra, note 121, p. 789. See also *Affaire des Forêts du Rhodope Central (Fond)*, 1933 *U.N.R.I.A.A.*. vol. III, p. 1405; *Ambatielos* claim, supra, note 99, p. 119; *Interhandel* case, supra, note 94, p. 28.

[123] *Robert E. Brown Claim*, 1923 *U.N.R.I.A.A.*, vol. VI, p. 120; *Vélasquez Rodríguez* case, 1989, 28 *I.L.M.* p. 291 at pp. 304-309.

[124] *Panevezys-Saldutiskis Railway* case, supra, note 121, p. 4 at p. 18; *S.S. "Lisman"*, 1937 *U.N.R.I.A.A.*, vol. III, p. 1769 at p. 1773; *"S.S. Seguranca"*, 1939 *U.N.R.I.A.A.*, vol. III p. 1861 at p. 1868; *Finnish Ships Arbitration*, supra, note 101, at p. 1495; *X. v. Federal Republic of Germany*, 1956, 1 *Yearbook of the European Convention on Human Rights*, p. 138; *X v. Federal Republic of Germany*, 1958-9, 2 *Yearbook of the European Convention on Human Rights*, p. 342 at p. 344; *X v. Austria*, 1960, 3 *Yearbook of the European Convention on Human Rights*, p. 196 at p. 202.

[125] *Finnish Ships Arbitration*, supra, note 101, pp. 1496-1497; *Vélasquez Rodríguez* case, supra, note 123, pp. 304-309; *Yağci and Sargin v. Turkey*, judgment of 8 June 1995 *European Court of Human Rights, Reports and Decisions*, No. 319, p. 3 at p. 17, para. 42; *Hornsby v. Greece*, judgment of 19 March 1997, 1997-II *European Court of Human Rights, Reports and Decisions*, No. 33, p. 495 at p. 509, para. 37.

[126] *Mushikiwabo and others v. Barayagwiza*, 1997, 107 *I.L.R.* 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies; resolution 1a/88, case 9755, *Ann Rep IA Com HR* 1987/88.

(4) The question whether local remedies do or do not offer the reasonable possibility an effective redress must be determined with regard to the local law and circumstances at the time at which they are to be used. This is a question to be decided by the competent international tribunal charged with the task of examining the exhaustion of local remedies. The decision on this matter must be made on the assumption that the claim is meritorious.[127]

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts,[128] human rights instruments and practice,[129] judicial decisions[130] and scholarly opinion. The Commission was, aware of the difficulty attached to giving an objective content or meaning to "undue delay", or to attempting to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the *El Oro Mining* case:

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[127] *Finnish Ships Arbitration*, supra, note 101, p. 1504; *Ambatielos Claim*, supra, note 99, pp. 119-120.

[128] See the discussion of early codifications attempts by *F. V. Garcia-Amador* in First Report, *Yearbook ... 1956*, vol. II, p. 173 at 223-226; art. 19 (2) of 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in, 1961, 55 *A.J.I.L.* p. 545 at p. 577.

[129] International Covenant on Civil and Political Rights (art. (1) (c)); American Convention on Human Rights (art. 46 (2) (c)); *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57, at p. 59; *Las Palmeras*, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdoğan v. Turkey*, Application No. 19807/92, No. 84 A, European Commission of Human Rights (1996), *Decisions and Reports*, p. 5 at p. 15.

[130] *El Oro Mining and Railway Company (Limited)* (*Great Britain v. United Mexican States*) 1931 *U.N.R.I.A.A.*, vol. V, p. 191 at p. 198. See also case concerning the *Administration of the Prince von Pless* Preliminary objections (1933) *P.C.I.J. Series A/B*, No. 52, p. 11 at p. 16.

> The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.[131]

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase "remedial process" is preferred to that of "local remedies" as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(7) The exception to the exhaustion of local remedies rule contained in article 10 [14] (a), to the effect that local remedies do not need to be exhausted where "the local remedies provide no reasonable possibility of effective redress", does not cover situations where the local remedies might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down by a State whose airspace has been accidentally violated; or where serious obstacles are placed in the way of his using local remedies by the respondent State or some other body. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State or because of the existence of a special hardship exception.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of

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[131] Supra, note 130 at p. 198.

property or a contractual relationship with the respondent State.[132] Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in support of the existence of such an exception in the *Interhandel*[133] and *Salem*[134] cases, in other

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[132] See Amerasinghe, supra, note 99, p. 138; T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", 1959, 35 *B.Y.I.L.* p. 83 at p. 94.

[133] Here the International Court stated: "it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means", supra, note 94, at p. 27. Emphasis added.

[134] In this case an arbitral tribunal declared that "[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence", 1932 *U.N.R.I.A.A.*, vol. II p. 1165 at p. 1202.

cases[135] tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[136] and the *Aerial Incident* case (*Israel v. Bulgaria*)[137] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,[138] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[139] in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) While the Commission took the view that it is necessary to provide expressly for this exception to the local remedies rule, it preferred not to use the term "voluntary link" to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. Moreover, it would be difficult to prove such a subjective criterion in practice. Hence the decision of the Commission to require the existence of a "relevant connection" between the

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[135] *Finnish Ships Arbitration*, supra, note 101; *Ambatielos Claim*, supra, note 99.

[136] Oral Pleadings of France, 1957 *I.C.J. Pleadings*, vol. I, p. 408.

[137] Case concerning the Aerial incident of 27 July 1955 (*Israel v. Bulgaria*) (Preliminary objections), Oral Pleadings of Israel, 1959, *I.C.J. Pleadings*, pp. 531-532.

[138] 1935 *U.N.R.I.A.A.*, vol. III, p. 1905.

[139] *Virginius* case, reported in J.B. Moore, *A Digest of International Law*, 1906, vol. II, p. 895 at p. 903; *Jessie* case, reported in. 1922, 16 *A.J.I.L.* pp. 114-116.

injured alien and the host State. This connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word "relevant", it was decided, would best allow a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien.

(11) The second part of paragraph (c) is designed to give a tribunal the power to dispense with the need for the exhaustion of local remedies where, in all the circumstances of the case, it would be unreasonable to expect compliance with this rule. Each case will obviously have to be considered on its own merits in making such a determination and it would be unwise to attempt to provide a comprehensive list of factors that might qualify for this exception. It is, however, suggested that the exception might be exercised where a State prevents an injured alien from gaining factual access to its tribunals by, for instance, denying him entry to its territory or by exposing him to dangers that make it unsafe for him to seek entry to its territory; or where criminal conspiracies in the host State obstruct the bringing of proceedings before local courts; or where the cost of exhausting local remedies is prohibitive.

Paragraph (d)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

> "In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having

> to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly."[140]

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an ad hoc arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

> "Consent of the parties to arbitration under its Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under its Convention."[141]

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[140] *Government of Costa Rica* case, Inter-American Court of Human Rights, (1984) 67 *I.L.R.*, p. 578 at 587, para. 26. See also *ELSI* case, supra, note 95, p. 42, para. 50; *De Wilde, Ooms and Versyp* cases ("Vagrancy Cases"), European Court of Human Rights, 1971, 56 *I.L.R.*, p. 337 at p. 370, para. 55.

[141] United Nations, *Treaty Series*, vol. 575, p. 159.

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.[142]

(15) Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was:

> "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[143]

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[144] and the writings of jurists support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national".[145] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the

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[142] *Government of Costa Rica* case, supra, note 140, p. 587, para. 26; "vagrancy cases, supra, note 140, p. 370, para. 55.

[143] Supra, note 95, p. 42, para. 50. Emphasis added.

[144] See, for example, *Steiner and Gross v. Polish State*, 1927-28, 4 *Annual Digest of Public International Law Cases*, p. 472; *American International Group Inc. v. Iran*, Award No. 93-2-3 (1983) 4 *Iran-US CTR* p. 96.

[145] F.A. Mann, "State contracts and international arbitration", 1967, 42 *B.Y.I.L.* p. 1 at p. 32.

Chamber of the International Court of Justice in the *ELSI* case.[146] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,[147] the Commission preferred not to refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. The Commission took the view that it was wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

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[146] Supra, note 95. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court of International Justice held that acceptance of the Optional Clause under Article 36, paragraph 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule; supra, note 121.

[147] See *ELSI* case, supra, note 95 at p. 44, para. 54; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* (Arbitration Tribunal), 1966, 102 *I.L.R.* p. 216, at p. 285 para. 6.33; *Foti and others*, 1982, 71 *I.L.R.* p. 366 at p. 380, para. 46.

CHAPTER VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

154. The Commission, at its thirtieth session, in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur.[148]

155. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.[149] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission, in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission, in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

156. The Commission, at the same thirty-sixth session, also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent,

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[148] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

[149] For the five reports of the Special Rapporteur, see *Yearbook ... 1980*, vol. II (Part One) p. 247, document A/CN.4/334 and Add.1 and 2; *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

fulfil or replace some of the procedures referred to in the schematic outline[150] and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".[151]

157. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996).[152]

158. At its forty-fourth session, in 1992, the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[153] On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages. It would first complete work on prevention of transboundary harm

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[150] *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[151] *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471.

[152] For the 12 reports of the Special Rapporteur, see:

> *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394;
> *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402;
> *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405;
> *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413;
> *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423;
> *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428;
> *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437;
> *Yearbook ... 1992*, vol. II (Part One), p. 75, document A/CN.4/443;
> *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450;
> *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459;
> document A/CN.4/468; and document A/CN.4/475 and Add.1

[153] *Yearbook ... 1992*, vol. II (Part Two), para. 281.

and subsequently proceed with remedial measures.[154] The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

159. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission. The Working Group submitted a report,[155] which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

160. At its forty-ninth session, in 1997, the Commission established a Working Group to consider how the Commission should proceed with its work on this topic. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the two issues dealt with under the topic, namely "prevention" and "international liability" were distinct from one another, though related. The Working Group therefore agreed that henceforth these issues should be dealt with separately.

161. Accordingly, the Commission decided to proceed with its work on the topic, dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[156] The General Assembly took note of this decision in paragraph 7 of its

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[154] Ibid., paras. 341-349. For a detailed recommendation of the Commission see ibid., ... 1995, chap. V.

[155] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10* (A/51/10), Annex I.

[156] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 168.

resolution 52/156. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[157] The Commission, from its fiftieth (1998) to its fifty-second session (2000), received three reports from the Special Rapporteur.[158]

162. At its fiftieth session, in 1998, the Commission adopted on first reading a set of 17 draft articles on prevention of transboundary harm from hazardous activities.[159] At the fifty-third session, in 2001, it adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities,[160] thus concluding its work on the first part of the topic. Furthermore, the Commission recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.

163. The General Assembly, in operative paragraph 3 of resolution 56/82, requested the Commission to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by Governments.

164. At its fifty-fourth session, in 2002, the Commission resumed its consideration of the second part of the topic and established a Working Group to consider the conceptual outline of the topic. The report of the Working Group set out some initial understandings on the topic "International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of

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[157] Ibid.

[158] A/CN.4/487 and Add.1; A/CN.4/501 and A/CN.4/510. The Commission also had before it comments and observations from Governments, A/CN.4/509 and A/CN.4/516, the latter being received in 2001.

[159] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 52.

[160] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 97.

hazardous activities)", presented views on its scope and the approaches to be pursued. The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for the topic.[161]

B. Consideration of the topic at the present session

165. At the present session, the Commission had before it the first report of the Special Rapporteur on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities (A/CN.4/531). It considered the report at its 2762nd, 2763rd, 2764th, 2765th, 2766th, 2767th, 2768th and 2769th meetings, on 23, 27, 28, 30 May and 3 to 6 June 2003.

166. At its 2769th meeting on 6 June 2003, the Commission established an open-ended working group under the chairmanship of Mr. Pemmaraju Sreenivasa Rao to assist the Special Rapporteur in considering the future orientation of the topic in the light of his report and the debate in the Commission. The Working Group held three meetings.

1. Introduction of the first report by the Special Rapporteur

167. The Special Rapporteur noted that his report was in three parts, Part I of which reviewed the work of the Commission on the topic, beginning with an analysis of the approaches of Robert Quentin Quentin-Baxter (A/CN.4/531, paras. 6-9) and Julio Barboza (ibid., paras. 10-14). It also analysed relevant issues, which gave rise to differences in the Commission's earlier work, as well as the extent to which such issues were resolved or remained outstanding.[162]

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[161] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 441.

[162] The strong linkage established between prevention and liability in the approaches adopted by Quentin-Baxter and Barboza which was considered problematic, was resolved by a decision of the Commission to split the topic to deal first with prevention and subsequently with liability. Other issues on which agreement was elusive were (a) State liability, and the role of strict liability as the basis for creating an international regime; (b) scope of activities and the criteria for delimiting "transboundary damage"; and (c) threshold of damage to be brought within the scope of the topic.

168. The Special Rapporteur recalled the endorsement by the Commission of the 2002 Working Group's recommendations that the Commission: (a) limit the scope of the topic to the same activities which were covered by the draft articles on the prevention, namely activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences; (b) concentrate on harm caused for a variety of reasons but not necessarily involving State responsibility; (c) deal with the topic as an issue of allocation of loss among different actors involved in the operations of the hazardous activities; (d) cover within the scope of the topic loss to persons, property, including the elements of State patrimony and natural heritage, and the environment within national jurisdiction.

169. The Special Rapporteur noted that Part I also raised broad policy considerations relevant to the topic (ibid., paras. 43-46), which in the main had formed the basis of the work of the Commission on the topic: (a) that each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (b) that the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; and (c) that insofar as may be consistent with the two preceding principles, the innocent victim[163] should not be left to bear his or her loss or injury.

170. While the draft articles on prevention had addressed the first objective and, partially, the second objective, the challenge for the Commission was to address the remaining elements of the policy. In particular, States must be encouraged to conclude international agreements and adopt suitable legislation and implementing mechanisms for prompt and effective remedial measures including compensation for activities involving a risk of causing significant transboundary harm.

171. The Special Rapporteur also observed that although there was general support for the proposition that any regime of liability and compensation should aim at ensuring that the innocent victim was not, as far as possible, left to bear the loss resulting from transboundary

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[163] "Innocent victim" is a convenient term used to refer to persons who are not responsible for the transboundary harm.

harm arising from hazardous activity, full and complete compensation may not be possible in every case. Factors which militated against obtaining full and complete compensation included the following: problems with the definition of damage; difficulties of proof of loss; problems of the applicable law, limitations on the operator's liability as well as limitations within which contributory and supplementary funding mechanisms operated.

172. Part II of the report reviewed sectoral and regional treaties and other instruments (ibid., paras. 47-113), some of which were well established and others not yet in force but instructive as models for allocation of loss in case of transboundary harm.[164] The Special Rapporteur noted that the liability regime governing space activities was the only one which provides for State liability.

173. On the basis of the review, the Special Rapporteur noted that the picture was a mixed one. Some instruments were either not yet in force or had not been widely ratified and yet there continued to be a discernible trend to explore aspects of liability further. The Special Rapporteur also drew attention to common features of the various regimes and raised fundamental issues concerning civil liability, noting in particular that the legal issues involved in a civil liability system were complex and could be resolved only in the context of the merits of a specific case. Such solutions also depended on the jurisdiction in which the case was instituted and the applicable law. Although it was possible to negotiate specific treaty arrangements to settle the legal regime applicable for the operation of an activity, he had refrained from drawing any general conclusions on the system of civil liability, as it might lead the Commission to enter a different field of study altogether.

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[164] E.g. in the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, not yet in force, see *32 ILM*, 1993, 1228 and the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, different actors share or bear liability for loss at different stages in the movement of hazardous wastes, UNEP/CHW/5/29. See also 1989 Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, United Nations document ECE/TRANS/79.

174. The Special Rapporteur noted that Part III of the report contained submissions for consideration by the Commission:

(a) While the schemes of liability reviewed had common elements, each scheme was tailor-made for a particular context. Certainly the review did not suggest that the duty to compensate would best be discharged by negotiating a particular form of liability convention. The duty could equally be discharged, if considered appropriate, by forum shopping and allowing the plaintiff to sue in the most favourable jurisdiction, or by negotiating an ad hoc settlement.

(b) States should have sufficient flexibility to develop schemes of liability to suit their particular needs. Accordingly, the model of allocation of loss to be endorsed by the Commission should be general and residuary in character.

(c) In developing such a model, and taking into consideration some of the earlier work of the Commission on the topic, the Special Rapporteur proposed that the Commission could take the following into consideration:

(1) Any regime should be without prejudice to claims under civil liability as defined by national law and remedies available at the domestic level or under private international law. For the purposes of the present scheme, the model of allocation of loss in case of transboundary harm need not be based on any system of liability, such as strict or fault liability;

(2) Any such regime should be without prejudice to claims under international law, in particular the law of State responsibility;

(3) The scope of the topic for the purpose of the present scheme of allocation should be the same as the one adopted for the draft articles on prevention;

(4) The same threshold of significant harm as defined and agreed in the context of the draft articles on prevention should be applied. The survey of the various schemes of liability and compensation showed that they all endorsed some threshold or the other as a basis for the application of a regime;

(5) State liability was an exception and was accepted only in the case of outer space activities;

(6) Liability and the obligation to compensate should first be placed at the doorstep of the person most in command and control of the hazardous activity at the time the accident or incident occurred. This might not always be the operator of an installation or a risk-bearing activity;

(7) Liability of the person in command and control of the hazardous activity could ensue once the harm caused could reasonably be traced to the activity in question. The test of reasonableness and not strict proof of causal connection should be sufficient to give rise to liability. This was necessary because hazardous operations involved complicated scientific and technological elements. Moreover, the issues involved harm which was transboundary in character;

(8) The test of reasonableness, however, could be overridden, for example, on the ground that the harm was the result of more than one source; or that there were other intervening causes, beyond the control of the person bearing liability but for which harm could not have occurred;

(9) Where the harm was caused by more than one activity and could be reasonably traced to each one of them, but could not be separated with any degree of certainty, liability could either be joint and several or could be equitably apportioned. Alternatively, States could decide in accordance with their national law and practice;

(10) Limited liability should be supplemented by additional funding mechanisms. Such funds may be developed out of contributions from the principal beneficiaries of the activity or from the same class of operators or from earmarked State funds;

(11) The State, in addition to the obligation earmarking national funds, should also be responsible for designing suitable schemes specific to addressing problems concerning transboundary harm. Such schemes could address protection of citizens against possible risk of transboundary harm; prevention of such harm from spilling over or spreading to other States on account of activities within its territory; institution of contingency and other measures of preparedness; and putting in place necessary measures of response, once such harm occurred;

(12) The State should also ensure that recourse was available within its legal system, in accordance with evolving international standards, for equitable and expeditious compensation and relief to victims of transboundary harm;

(13) The definition of damage eligible for compensation was not a well-settled matter. Damage to persons and property was generally compensable. Damage to environment or natural resources within the jurisdiction or in areas under the control of a State was also well accepted. However, compensation in such cases was limited to costs actually incurred on account of prevention or response measures as well as measures of restoration. Such measures must be reasonable or authorized by the State or provided for under its laws or regulations or adjudged as such by a court of law. Costs could be regarded as reasonable if they were proportional to the results achieved or achievable in the light of available scientific knowledge and technological means. Where actual restoration of damaged environment or natural resources was not possible, costs incurred to introduce equivalent elements could be reimbursed;

(14) Damage to the environment per se, not resulting in any direct loss to proprietary or possessory interests of individuals or the State should not be considered compensable, for the purposes of the present topic. Similarly, loss of profits and tourism on account of environmental damage need not be included in the definition of compensable damage. However, it could be left to national courts to decide such claims on their merits in each case.

175. The Special Rapporteur noted that the above recommendations, if found generally acceptable, could constitute a basis for drafting more precise formulations. The Commission was also requested to comment on the nature of instrument that would be suitable and the manner of ultimately disposing of the mandate. On a preliminary basis, one possibility he suggested was to draft a few articles for adoption as a protocol to a draft framework convention on the regime of prevention.

2. Summary of the debate

(a) General comments

176. The Special Rapporteur was commended for a comprehensive report. Comments and observations focused on the viability of the topic as a whole as well as its conceptual and structural affinities in relation to other areas of international law, such as State responsibility.

177. Members of the Commission continued to express different views on the viability of the topic. Some members suggested that the viability of the topic as a whole should not be an issue again. The 2002 Working Group had discussed the matter extensively and the Commission endorsed its recommendations. Moreover, the Sixth Committee was favourably disposed towards the consideration of the topic, viewing it as a logical follow-up to the draft articles on prevention as well as to the topic on State responsibility. It was further noted that since the General Assembly, in operative paragraph 3 of resolution 56/82, had requested the Commission to resume the consideration of the liability aspects of the topic and article 18, paragraph 3, of the Statute of the Commission required that priority be given to requests of the General Assembly, a discussion on the viability of the project was misplaced.

178. The view was nevertheless maintained that the topic was inappropriate for, and did not easily lend itself to, codification and progressive development. According to this view, a global approach was unlikely to yield constructive results. In this context, reference was made to paragraphs 46 and 150 of the report of the Special Rapporteur which note that the treaties analysed revealed that there could not be a single pattern of allocation of loss and that the legal issues involved were complex and could be resolved only in the context of the merits of a specific case. It was also noted that the Commission at its forty-eighth session (1996) and its forty-ninth session (1997), had already acknowledged that the trends for requiring compensation were not grounded in a consistent concept of liability[165] and considered the scope and content of the topic to be nebulous.[166] In addition, the following difficulties were noted: (a) that the topic under consideration was not a topic at all since the issues contemplated already formed the corpus of the law of State responsibility; (b) that the activities concerned were difficult to regulate since the various regimes provided for diverse particularities to the extent that it would be difficult to deal with the topic in general terms; (c) that the nature of the topic did not concern public international law; (d) that the topic was not for the Commission to consider but for negotiating or other bodies dealing with harmonization; and (e) that the topic was not part of the Commission's mandate. Further, there existed no agreement on the matter in doctrine, jurisprudence or practice.

179. On the other hand, some members were of the opinion that the topic, particularly as it concerned the allocation of loss, was not appropriate for codification and progressive development. They expressed the view that the subject was important theoretically and in practice, with a greater incidence of highly probable cases in the future. They also noted that some of the various criticisms against the topic needed to be taken into account in the Commission's work, but they did not debar the Commission from achieving a realisable

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[165] *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, annex 1, para. (32) of the commentary to article 5.

[166] *Yearbook ... 1997*, vol. II (Part Two), document A/51/10, chap. VII, para. 165.

objective. The Commission could elaborate general rules of a residual character that would apply to all situations of transboundary harm that occurred despite best practice prevention measures.

180. With regard to the conceptual framework of the topic, some members stated that the topic was filling a gap. It was addressing situations where in spite of the fulfilment of the duties of prevention to minimize risk significant harm was caused by hazardous activities. In most cases, such activities were conducted by private operators, giving rise to questions of liability of the operator and of the State that authorized the activity. Such activities were not unlawful and were essential for advancement of the welfare of the international community and system of allocation of loss served well to balance the various interests.

181. It was also stressed that there was a link between prevention and allocation of loss arising from hazardous activities and it was that link which underpinned the question of compensation. Consequently, the work of the Commission would remain superficial if elements of such a relationship were not fleshed out, including ascertaining whether or not strict liability constituted the basis of liability of a State for activities involving risk. It was also noted that it would be interesting to conduct a study to determine the extent to which recent environmental disasters were a result of a violation of the duty of prevention.

182. Recognizing that the Commission's effort on the topic was still fraught with structural problems, the view was expressed that the Commission would have to grapple with two major policy questions. The first was to define fully the contours of the topic and deal with those situations in which there was no responsibility according to general principles of international law of State responsibility but which caused damage to innocent victims; and secondly, to deal with different social costs, which, from an analysis of the various regimes, were varied from sector to sector.

183. In dealing with the first question, the view was expressed that vague references to points of principle alone, namely that rules of State responsibility would or should not be prejudiced, might not be enough to address the real questions of overlap. In operational terms, it was suggested that State responsibility, to a great extent, dealt with the subject matter of the present

topic. State responsibility had more relevance and resilience in achieving recovery than was acknowledged. On the basis of the *Corfu Channel* case (Merits), States are responsible in certain circumstances for controlling sources of harm in their territory.[167] Each State is under the obligation not to allow its territory to be used for acts of which it had knowledge or means of knowledge contrary to the rights of other States. Such obligation would apply to the environment as well. Moreover, it was noted that the view that State responsibility obligations were based on fault was wholly exceptional: the general approach of tribunals in applying principles of State responsibility, was to apply the principle of "objective responsibility" which was in reality very close to the concept of "strict liability" at least as understood at common law. In contrast, principles of State liability did not exist in general international law.

184. On the second question concerning social costs, it was stressed that it was necessary for the Commission to take into account the effect of a general compensation regime on encouraging or discouraging certain beneficial activities. One model, which was more nuanced to the specific needs of a particular sector, proceeded on a sector-by-sector basis. It was suggested that solutions modelled on fishery conservation or similar regimes, including possibilities of negotiated or institutionally monitored waivers could be explored.

185. Comments were also made on the terminology used and the various issues raised by the Special Rapporteur in his report.

186. Commenting on the terminology in the report, some members noted that the title of the report "Legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities" was misleading. However, the view was expressed that the use of "models" or "legal regime" could be a reflection of the Commission's own uncertainties about the nature of the final result and the use of such terms should be perceived as possible

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[167] *I.C.J. Reports*, 1949, 1 at 22.

alternatives to a draft convention. Some members commented also on the appropriateness of the expression "innocent victim", particularly in relation to the case concerning damage to the environment. Another view objected, in principle, to the use of the expression "innocent victim".

187. It was averred that the term "allocation of loss" or "loss" was inconvenient. Instead, the more familiar terms such as "damage" and "compensation" could be reverted to. Further, it was suggested that the regime for "allocation of loss" may be more accurately referred to as "allocation of damages". The use of "civil liability" was also cautioned against by some members who noted that in some jurisdictions which drew a distinction between civil and administrative law, liability had been extensively developed not only in the context of "civil liability" but also in relation to "administrative liability" on the basis of the principle that a public burden should be shared equally by all citizens.

188. With regard to the general scope of the topic, support was reiterated for the recommendations of the 2002 Working Group. Some members considered the inclusion of the "global commons" tantamount to changing the orientation of the topic and constituting a deviation from the approved scope of the topic. Other members viewed it as an area worth studying, with some suggesting that protection of the global commons be included in the Commission's long-term programme. The inclusion of State patrimony and national heritage within the scope of coverage of loss to persons and property was also viewed positively.

189. Concerning the threshold of liability there was broad support for maintaining the same threshold of "significant harm" as in the draft articles on prevention. However, some members expressed a preference, for the purposes of compensation, for a lower threshold such as "appreciable harm".

190. While issues concerning damage by transnational corporations in the territory of a host country and their liability were critical, some members viewed any consideration of such issues within the context of the topic, or at any rate by the Commission, with reticence. Moreover, it

was noted that questions concerning civil liability such as those on proper jurisdiction, in particular the consideration of cases such as *Ok Tedi* case[168] and the 1984 Bhopal disaster litigation went beyond the general scope of the topic.

191. The view was however expressed that the Special Rapporteur should have analysed further the various cases cited in order to illustrate the full nature of the problems involved. It was stressed that any emphasis on traditional civil liability approaches should not be considered as an excuse for not dealing with questions concerning damage to the environment.

192. With regard to the various regimes analysed by the Special Rapporteur in his report, some members of the Commission observed that the spread of national legislation, regional and other instruments covered could have been wider and a separate compilation of all instruments and exploration of other instruments would be relevant.[169] Mention was made of recently concluded instruments such as the 2003 Kiev Protocol on Civil Liability and Compensation for Damage caused by Transboundary Effects of Industrial Accidents on Transboundary Waters.[170]

(b) Comments on the summation and submissions of the Special Rapporteur

193. Members also commented on the specific submissions of the Special Rapporteur in his report (paragraph 174, subparagraphs (a), (b) and (c) (1) to (14) above). There was wide support for a regime that would be general and residual in character. The view was expressed that any

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[168] *Dagi and Others v. Broken Hill Property Co. Ltd.*, 1997, *1 Victoria Rep. 428.*

[169] Reference was made of the civil aviation liability regime established under the "Warsaw system".

[170] UNECE document MP/WAT/2003/1.

CP.TEIA/2003/3 of 11 March 2003. It is a Protocol to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *31 ILM*, 1992, 1312 and the 1992 Convention on the Transboundary Effects of Industrial Accidents, *31 ILM*, 1992, 1333. See also the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund, which establishes an additional "third tier" supplementary fund, LEG/CONF.14/20.

rules for allocation of loss should not replace existing regimes, discourage the development of new ones, or attempt to provide new detailed comprehensive regimes with wide scope to cover all conceivable circumstances.

194. On the other hand, it was considered reasonable to envision a comprehensive regime that covered all aspects of allocation of loss. On this account, allocation of loss should be studied in a comprehensive manner to take into consideration domestic law systems.

195. Some members offered tentative comments. It was pointed out that, given the divisions on the feasibility of the topic, it was premature to make definitive submissions. It was also noted that it was difficult to comment without knowing whether the end product envisaged would be a model for allocation of loss for a treaty regime, national legislation or merely a set of recommendations or guidelines. Moreover, the point was made that there was a gap between the description of the existing regimes in Part II of the Special Rapporteur's report and the submissions in Part III indicating a failure to offer a perspective from which the Commission should consider the matter. The viewpoint was also expressed that some of the submissions (paragraph 174, subparagraphs (c) (10) to (14) above) only confirmed that the topic was not appropriate for codification.

196. Some other members expressed support for the general thrust of the submissions, which were realistic and constituted a directory of problems and questions to be considered. It was noted that some submissions, in particular points (7) to (12) (paragraph 174, subparagraphs (7) to (14) above) were condensed and some aspects thereof needed further discussion in the context of a working group.

(1) Application of regime to be without prejudice to other civil liability schemes (paragraph 174, subparagraph (c) (1) above)

197. Several members expressed support for this submission. With the financial limits imposed by the various regimes, it was reasonable not to foreclose the possibility of receiving better relief and the continued application of the polluter-pays principle under national law.

198. It was suggested that the exhaustion of domestic mechanisms first would not be necessary before recourse to international mechanisms. In addition, a role could be envisaged for multiple national jurisdictions and mechanisms, especially in the State of origin and the State of injury. In this connection, support was expressed for the principle laid down in the *Handelskwekerij G. J. Bier v. Mines de Potasse d'Alsace S.A.* case.[171] The 2003 Kiev Protocol was also cited as providing opportunity for forum shopping.

199. Concerning the Special Rapporteur's submission that a model of loss need not be based on any system of liability, such as strict or fault liability, preference was expressed for strict liability. It was also noted that the suggestion did not make the consideration of the topic any easier. Generally, liability was limited in cases of strict liability. Accordingly, even if the question of strict or fault liability was to be set aside, the basis of residual State liability would arise as would the question whether or not compensation would in such cases be full or limited.

(2) Application of regime to be without prejudice to claims under international law (paragraph 174, subparagraph (c) (2) above)

200. The Commission expressed support for this submission. It was stressed that there should be special care not to prejudice the work on State responsibility. A statement to that effect would not be sufficient for that purpose. It was not clear whether or not the local remedies rule would apply if a State responsibility claim was made: whether the civil liability claims system in domestic courts would replace the local remedies rule or reinforce its ambit. It was not apparent whether the existence of civil liability remedies within a municipal system would qualify as "another available means of settlement" within the meaning of such phrases in the acceptance of the compulsory jurisdiction of the International Court of Justice.

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[171] 21/76, *II ECR*, 1976, 1735. The Court of Justice of the European Communities construed the phrase "in the courts of the place where the harmful events occurred" under the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters as meaning the choice of forum between the State in which the harm occurred and the State in which the harmful activity was situated; and the choice of forum belonged to the plaintiff whom the Convention seeks to protect.

(3) Scope of topic similar to draft articles on prevention (paragraph 174, subparagraph (c) (3) above)

201. Support was expressed for this submission. It gave flexibility to the Commission when it finally decides on the form of the final product. Some members regretted the exclusion from the scope of the topic of harm to the environment in areas beyond national jurisdictions. It was also reiterated that the Commission should not deal with the global commons, at least at the current stage, since it had its own peculiarities.

202. It was observed that in certain situations, harm caused within the territory of the State of origin would be no less significant than harm in a transboundary context. In a comprehensive regime, on the basis of the principle of equality of treatment of persons, such harm should not be ignored. Article XI of the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage, which seeks to protect those who suffer nuclear damage in and outside the State of the installation, was cited as an example.

(4) "Significant harm" same threshold as in the draft articles on prevention of transboundary harm (paragraph 174, subparagraph (c) (4) above)

203. There was broad support for maintaining the same threshold of "significant harm" as in the draft articles on prevention. However, some members expressed a preference, for the purposes of compensation, for a lower threshold such as "appreciable harm". The suggestion was made that, in the context of liability, the term "significant harm" could be changed to "significant damage". The importance of reaching agreement on the meaning of "significant harm" that would be understood in all legal systems was emphasized.

(5) State liability exception as a basis for a model of liability (paragraph 174, subparagraph (c) (5) above)

204. Support was expressed for this submission. However, it was noted that in models of liability and compensatory schemes, the State had a prominent role, either directly when it would bear loss not covered by the operator or indirectly through the establishment of arrangements for allocation of loss. It was also noted that residual liability for States was also supported in the

Sixth Committee and was contained in several instruments, including the Lugano Convention, the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy[172] as well as the proposal for a Directive of the European Parliament and of the Council on Environmental Liability.[173] Moreover, it was suggested that it was worth analysing whether and the extent to which the approaches under space liability regime could affect other models of liability or conversely the extent to which the regime could be modified in future by following other models considering the involvement of non-State actors in space activities.

(6) Liability for person in command and control (paragraph 174, subparagraph (c) (6) above)

205. It was noted that the term "operator" was not a term of art. In the 1993 Lugano Convention the term was used to characterize the person who exercises the control of the activity and the proposal for a Directive of the European Parliament and of the Council on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage the term applied to any person who directs the operation of an activity, including a holder of a permit or authorization for such activity and/or the person registering or notifying such activity. It was suggested that the term "operator" could be used to describe the person in "command and control". It was further suggested that the operator of the activity should be primarily liable since the operator was the person who carried out an activity and was practically responsible all the way. It was pointed out that "command and control" could give rise to different interpretations.

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[172] (As amended in 1964 and 1982). United Nations, *Treaty Series*, vol. 956, p. 251; UKTS, 1968, 69; UKTS, 1989, 6.

[173] Proposal for a Directive of the European Parliament and of the Council on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, Brussels, 23 January 2002, COM (2002) 17 final, 202/0021 (COD).

206. Further, it was observed that this proposition should be reviewed from the perspective of the need to secure assets in the event of loss. It was essentially for that reason that shipowners rather than the charterers are held liable in pertinent conventions for harm caused by ships. Those who owned assets such as ships could insure such assets against risk and could easily pass on the costs to others if necessary.

(7) Test of reasonableness as basis for establishing causal link (paragraph 174, subparagraph (c) (7) above)

207. The test of reasonableness was supported since it was difficult to establish a causal link in activities containing an element of risk. However, some members doubted whether there was a real distinction between "causality" and "reasonableness". According to this view, "causality" is the criterion for reasonableness. Other members expressed preference for "proximate cause". It was also pointed out that the test of reasonableness did not obviate the need to consider and determine the standard of proof for establishing the causal link.

(8) Exceptions to limited liability (paragraph 174, subparagraph (c) (8) above)

208. It was suggested that the situation where the harm is caused by more than one source could constitute an exception to limited liability. It was also pointed out that it was also necessary to provide safeguard clauses for damage arising from armed conflict, force majeure, or through fault of the injured or third party.

(9) Joint and several liability (paragraph 174, subparagraph (c) (9) above)

209. Several members agreed to the need for liability to be joint or several where harm is caused by more than one activity. It was doubted however that "equitable apportionment" constituted a good basis for liability in situations where it was difficult to trace harm to one particular activity and whether it could in practice be objectively determined. Instead, States should be allowed to negotiate in accordance with their national law and practice. On the other hand, it was proposed that the principle of equitable apportionment could be provided for in a

general manner leaving States or parties concerned to agree on measures of implementation. It was also suggested that the reference to "in accordance with national law and practice" be deleted to allow States other possibilities, such as negotiation, arbitration or other means of settlement.

(10) Limited liability to be complemented by supplementary funding mechanisms (paragraph 174, subparagraph (c) (10) above).

210. Some members stressed that in addition to minimum limits, maximum ceilings should be set for insurance and additional funding mechanisms.

211. The view was expressed that loss be allocated among the different actors, including the operator as well as those who authorized, managed or benefited from the activity. A State acting as an operator should also be liable in that capacity. In the exceptional case where the operator could not be identified, was unable to pay in full or was insolvent, it was suggested that the State of origin could assume residual liability. Consequently, the State concerned should make insurance mandatory or have the right to be notified of the risk and demand that such activity be insured. It was also suggested that a State should be held liable only if it was responsible for monitoring the activity. It was also suggested that it was necessary to enjoin States irrespective of their involvement in an activity and article IV of the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage was perceived as establishing a useful precedent.

212. Since the amount for which the operator would be liable was likely to be inadequate, the point was made that liability whether limited or not should always be supplemented by additional funding mechanisms. Article 11 of the Kiev Protocol was considered an example.

213. However, the view was expressed that the presumption that limited liability was inadequate for compensation in all cases was not always correct. Much depended on the type of activity and the targeted economies.

214. The recommendation that the State should take the responsibility for the design of suitable schemes was supported, noting that it was consistent with Principle 21 of the Stockholm Declaration on the Human Environment[174] as well as Principle 13 of the Rio Declaration,[175] which was confirmed in the Plan of Implementation of the World Summit on Sustainable Development.[176]

215. It was contended that the role of the State in this matter was underpinned by its obligation to conduct activities within its jurisdiction or control in a manner so as not to cause transboundary environmental harm. The principle of prevention was highlighted in the *Trail Smelter*[177] arbitration case, reiterated in Principle 2 of the Rio Declaration and confirmed in the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict.*[178] It was also pointed out that such rationale was embedded in the principle of collective solidarity. It was also suggested that the duty of States to take preventive measures could also contribute to compliance with the draft articles on prevention.

(11) Other obligations for States, including availability of recourse procedures (paragraph 174, subparagraph (c) (11) and (12) above)

216. The point was made that the dispute settlement mechanisms such as arbitration, including questions concerning the applicable law should not be excluded from the overall scope of the topic. In this connection, reference was made to article 14 of the Kiev Protocol which provided

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[174] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14).

[175] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1972* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[176] A/CONF.199/20, resolution 2 of 2 September 2002, annex.

[177] 33*A.J.I.L.* 1939, 182 and 35*A.J.I.L.* 1941, 684.

[178] *I.C.J. Reports*, 1996, 226, at para. 29.

for arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment for disputes between persons claiming damage and persons liable under the Protocol.

217. It was proposed that the Special Rapporteur in developing the recommendations further should take into account articles 21 (Nature and extent of compensation or other relief) and 22 (Factors for negotiations) adopted by the 1996 Working Group.[179]

218. Support was also expressed for the proposition that the State should ensure the availability of recourse procedures within the legal system and it was pointed out that such a right should be guaranteed.

(12) Damage to the environment, environment per se and loss of profits and tourism (paragraph 174, subparagraph (c) (13) and (14) above)

219. The submission that damage to the environment per se should not be considered compensable for the purposes of the topic received some support. In that regard it was noted that there was a distinction between damage to the environment, which could be quantified and damage to the environment, which was not possible to quantify in monetary terms. It was pointed out that in some liability regimes, such as the Lugano Convention[180] and the proposal on a Directive of the European Parliament and of the Council on Environmental Liability, damage to the environment[181] or natural resources would be directly compensable. The work of the

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[179] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), annex I.

[180] Compensation for impairment in such case, other than for loss of profit from such impairment, is limited to the costs of measures of reinstatement actually undertaken or to be undertaken.

[181] Under the Proposal for a Directive, Environmental damage is to be defined in the context of the proposal by reference to biodiversity protected at Community and national levels, waters covered by the Water Framework Directive and human health when the source of the threat to human health is land contamination.

United Nations Compensation Commission was also considered helpful in this area.[182] A separate issue was whether, in view of global interconnectedness, the inclusion of damage to the environment beyond national jurisdiction should be considered.

220. Concerning loss of tourism as such or loss of profits, it was noted that while there might not be a clear causal link to proprietary or possessory interest, in certain instances harm would be catastrophic to economies of States. Some members made reference to article 2 (d) (iii) of the Kiev Protocol which defined "damage" as covering also income deriving from the impairment of a legally protected interest in any use of the transboundary waters for economic purposes, incurred as a result of the impairment of the transboundary waters, taking into account savings and costs.

221. It was noted that the report did not offer any well founded basis for the conclusion reached that loss of profits and tourism on account of environmental damage are not likely to be compensated and should be excluded from the topic. It was also questioned whether such loss was directly connected to damage to the environment per se.

(13) Form of instrument

222. Support was expressed for the Special Rapporteur's suggestion that the Commission's work on liability take the form of a draft protocol. Some members favoured a convention, with inter-State dispute settlement clauses. Some other members argued that the liability aspects be treated on an equal footing with the draft articles on prevention. Thus, a convention, rather than a protocol, with one part on prevention and another enunciating general principles of liability was preferred.

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[182] Security Council resolutions 687 (1991) and 692 (1991). See also Report of the Secretary-General, S/22559 of 2 May 1991.

223. Some members favoured recommendations, guidelines or general rules on liability. Further, a declaration of principles, focusing on the duty of States to protect innocent victims was also viewed as a possible outcome. The possibility of preparing model clauses, with alternative formulations, as appropriate, was also offered.

224. Other members observed that it would be premature to decide on the nature of the instrument. Such a decision would have to emerge from the continuing work of the Commission, noting that it may well be that "soft law" approaches would eventually be advisable.

3. Special Rapporteur's concluding remarks

225. In response to some of the comments and observations, the Special Rapporteur recounted the earlier efforts by the Commission to address the conceptual issues, particularly of delineating the topic to distinguish it from other topics concerning State responsibility and the law of non-navigational uses of watercourses, the impact that international environmental law had on the discussions and how eventually a pragmatic step-by-step approach was considered most feasible. He also noted that the question of the global commons had been discussed and was left out to make the consideration of the topic manageable [183]and the issue could be revisited once the Commission had finalized the model of allocation of loss.

226. He recalled the discussions in the 2002 Working Group and the direction given to him to develop a model on allocation of loss without linking it to any particular legal basis and to have such a model elaborated following a review of the various existing models. The report therefore concentrated on the outcomes or results and avoided emphasis on the process of negotiations of such instruments or on the attitude of States towards the regimes concerned either during the process of the negotiation or after their conclusion.

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[183] See for example, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 443-448.

227. The terminology used in his report was a product of an effort to conceptualize the topic within manageable confines and to overcome any imputation of linkages with other topics. International "liability" contrasted with State "responsibility"; the term "allocation of loss" was intended to overcome the legal connotations associated with "reparation" in relation to State responsibility or "compensation" in relation to civil liability.

228. Concerning the question of the operator's liability, the Special Rapporteur noted that the legal basis on which such liability would have to lie was not self evident. Although strict liability was well recognized in national legal systems, it could not be stated that it was well accepted or understood as a desirable policy in the context of transboundary harm and should be cautiously approached. Further, it was difficult to establish a comprehensive legal regime, which reconciled different elements of a civil liability regime. Such an exercise would be time consuming and involve many jurisdictions and different legal systems.

229. He conceded that pertinent questions had been raised on the relationship between the claims concerning civil liability of the operator and possible claims against the State. However, such questions would only be relevant if the purpose of the exercise was to address a share of loss to the State as a consequence of its liability for the harm caused; and not if the allocation of the loss to the State resulted in an obligation of the State to earmark funds at national level as a matter of social duty to make good a portion of the loss suffered by the innocent victim which was otherwise not assumed in the liability of the operator.

230. A multiple-tier approach for compensation was a well-established pattern in the various regimes and it was considered appropriate by the 2002 Working Group.[184] He pointed out that the social justification and equity for involving the State in a subsidiary tier cannot be overemphasized in any scheme of allocation of loss, particularly where the operator's liability

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[184] Ibid., paras. 449-456.

was limited or when the operator cannot be traced or identified. While the mandate of the Commission was to deal with transboundary harm, it would be anticipated that any model to be proposed could be useful in providing similar relief to innocent victims even within the jurisdiction of the State of origin. The modalities for doing so could be a matter for further reflection.

231. He noted that there was need for further work and reflection on the various issues raised and if possible to produce as part of the next report concrete formulations.

CHAPTER VII

UNILATERAL ACTS OF STATES

A. Introduction

232. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[185]

233. The General Assembly, in paragraph 13 of resolution 51/160, inter alia, invited the Commission to further examine the topic "Unilateral Acts of States" and to indicate its scope and content.

234. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[186]

235. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodríguez Cedeño, Special Rapporteur on the topic.[187]

236. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its work programme.

237. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[188] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

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[185] Ibid., *Fifty-first Session, Supplement No. 10* (A/51/10) p. 230 and pp. 328-329.

[186] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 196-210 and 194.

[187] Ibid., paras. 212 and 234.

[188] A/CN.4/486.

238. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[189]

239. At its fifty-first session, in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[190] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

240. The Working Group reported to the Commission on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

241. At its fifty-second session, in 2000, the Commission considered the third report of the Special Rapporteur on the topic,[191] along with the text of the replies received from States[192] to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

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[189] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 192-201.

[190] A/CN.4/500 and Add.1.

[191] A/CN.4/505.

[192] A/CN.4/500 and Add.1.

242. At its fifty-third session, in 2001, the Commission considered the fourth report of the Special Rapporteur[193] and established an open-ended Working Group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

243. At its fifty-fourth session, in 2002, the Commission considered the fifth report of the Special Rapporteur,[194] as well as the text of the replies received from States to the questionnaire on the topic circulated on 31 August 2001.[195] The Commission also established an open-ended Working Group.

B. Consideration of the topic at the present session

244. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/534). The Commission considered the sixth report at its 2770th, 2771st, 2772nd, 2773rd and 2774th meetings from 7 to 11 July 2003, respectively.

245. At its 2771st meeting, the Commission established an open-ended Working Group on Unilateral acts of States chaired by Mr. Alain Pellet. The Working Group held six meetings (see section C below).

1. Introduction by the Special Rapporteur of his sixth report

246. The Special Rapporteur, said that the sixth report dealt in a very preliminary and general manner with one type of unilateral act, recognition, with special emphasis on recognition of States, as some members of the Commission and some representatives in the Sixth Committee had suggested.

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[193] A/CN.4/519.

[194] A/CN.4/525 and Add.1, Corr.1, Corr.2 (Arabic and English only) and Add.2.

[195] A/CN.4/524.

247. To define the nature of a unilateral legal act *stricto senso* was not easy, but that in no way meant that it did not exist. There was no doubt that declarations that took the form of unilateral acts could have the effect of creating legal obligations, as the International Court of Justice indicated in its decisions in the *Nuclear Tests* cases.

248. The Special Rapporteur recalled that the Commission had said in 1997 that it was possible to engage in codification and progressive development, for which the topic was ripe.

249. However, while government opinions had not been numerous, they were fundamental to the consideration of the topic. The fact that practice had not been sufficiently analysed was one of the major obstacles the Special Rapporteur had encountered.

250. Unilateral acts were formulated frequently, but, without knowing the views of States, it was not easy to determine what the nature of the act was and whether the State that had formulated it had the intention of acquiring legal obligations and whether it considered that the act was binding or that it was simply as a policy statement, the result of diplomatic practice.

251. It was difficult to tell what final form the Commission's work might take. The Special Rapporteur indicated that, if it proved impossible to draft general or specific rules on unilateral acts, consideration might be given to the possibility of preparing guidelines based on general principles that would enable States to act and that would provide practice on the basis of which work of codification and progressive development could be carried out. Whatever the final product, the Special Rapporteur believed that rules applicable to unilateral acts in general could be established.

252. In the first place, a unilateral act in general and an act of recognition in particular must be formulated by persons authorized to act at the international level and to bind the State they represented. Moreover, the act must be freely expressed, and that made its validity subject to various conditions.

253. The binding nature of a unilateral act might be based on a specific rule, "*acta sunt servanda*", taken from the "*pacta sunt servanda*" rule that governed the law of treaties. It might also be stated as a general principle that a unilateral act was binding on a State from the moment

it was formulated or the moment specified in the statement by which the State expressed its will. The act would then be binding. Similarly, the act could not be modified, suspended or revoked unilaterally by its author and its interpretation must be based on a restrictive criterion.

254. The aim of the sixth report was to bring the definition and examination of a specific material act - recognition - into line with the Commission's work on unilateral acts in general.

255. Chapter I dealt with the various forms of recognition and ended with an outline definition that could be aligned with the draft definition of unilateral acts in general. The Special Rapporteur attempted to show that the draft definition considered by the Commission could encompass the category of specific acts constituted by recognition. What was most important was to determine whether it was a unilateral act in the sense of a unilateral expression of will formulated with the intention of producing certain legal effects.

256. The Special Rapporteur said that the institution of recognition did not always coincide with the unilateral act of recognition. A State could recognize a situation or a legal claim by means of a whole range of acts or conduct. In his view, implicit recognition, which undoubtedly had legal effects, could be excluded from the study of the acts the Commission was seeking to define.

257. Silence, which had been interpreted as recognition, for example, in the cases concerning the *Temple Preah Vihear* or the "Right of Passage over Indian territory", must, even though it produced legal effects, be excluded from unilateral acts proper.

258. Recognition based on a treaty, acts of recognition expressed through a United Nations resolution and acts emanating from international organizations should also be eliminated from the scope of the study.

259. In chapter I, the Special Rapporteur raised some questions that were crucial to the adoption of a draft definition of the unilateral act of recognition, especially with regard to the criteria for the formulation of such an act and its discretionary nature.

260. There were no criteria governing the formulation of an act of recognition. The recognition of States and the recognition of a state of belligerency, insurgency or neutrality also seemed not to be subject to specific criteria and the same seemed to apply also to situations of a territorial nature.

261. The Special Rapporteur referred to non-recognition. A State could be prohibited from recognizing de facto or de jure situations, but it was not obliged to take action or to formulate such non-recognition.

262. The report also generally discussed the possibility that the act of recognition, besides being declaratory, might be hedged around with conditions, something which might appear inconsistent with its unilateral nature.

263. The intention of the author State was an important element, since the legal nature of the act lay in the expression of intent to recognize and in the creation of an expectation.

264. The Special Rapporteur considered that the form taken by the act of recognition, which could be formulated in writing or orally, was, in itself, of no importance. The best approach was to retain the act of recognition expressly formulated for that purpose. A definition of the act of recognition was contained in paragraph 67 of the report.

265. Chapter II of the report dealt briefly with the validity of the unilateral act of recognition by following closely the precedent set with regard to the unilateral act in general: the capacity of the State and of persons; the expression of will of the addressee(s); the lawful object and, more specifically, conformity with peremptory norms of international law.

266. Chapter III examined the question of the legal effects of the act of recognition, in particular, and the basis for its binding nature, referring once again to the precedent of the unilateral act in general. The Special Rapporteur pointed out first of all that, according to most legal writers, the act of recognition was declarative and not constitutive.

267. The recognizing State had to conduct itself in accordance with its statement, as in the case of estoppel. From the moment the statement was made or from the time specified therein, the State or other addressee could request the author State to act in accordance with its statement.

268. The binding nature of the unilateral act in general and of recognition in particular must be justified, whence the adoption of a rule based on *pacta sunt servanda* and called *acta sunt servanda*. Legal certainty must also prevail in the context of unilateral acts.

269. Chapter IV dealt in general with the application of the act of recognition with a view to drawing conclusions about the possibility whether and conditions under which a State might revoke a unilateral act. A brief reference was also made to the spatial and temporal application of the unilateral act in the case of the recognition of States in particular.

270. The modification, suspension and revocation of unilateral acts were also examined, namely, whether States could modify, suspend or revoke acts unilaterally, in the same way as they had formulated them. A general principle could be established whereby the author could not terminate the act unilaterally unless that possibility was provided for in the act or there had been some fundamental change in circumstances. The revocation of the act would thus depend on the conduct and attitude of the addressee.

271. In conclusion, the Special Rapporteur said that the sixth report was general in nature and that further consideration was required to see how the Commission should complete its work on the topic. It was worthwhile establishing some general principles and relevant practice should also be studied; some bibliographical research was being conducted.

2. Summary of the debate

272. Several members reiterated the importance of the topic since State practice showed that unilateral acts gave rise to international obligations and played a substantial role in State relations, as demonstrated by a number of cases considered by the International Court of Justice. It was therefore desirable to lay down some rules for such acts in the interests of legal security.

It was useful for States to know when the unilateral expression of their will or intentions would, quite apart from any treaty-based link, constitute a commitment on their part. In particular, an explanation could be sought as to certain issues, such as the means by which a sovereign State trapped itself by expressing its will or how it could derive legal obligations from its sovereignty, even when it was not necessarily dealing with another State.

273. Attention was drawn to the fact that, in the introduction to his sixth report, the Special Rapporteur himself seemed to cast doubts as to the existence of unilateral acts. In this connection, the view was expressed that the topic was not ready for codification since it did not exist as a legal institution; according to this line of reasoning, unilateral acts only describe a sociological reality of informal interaction among States which sometimes leads them to be bound by their actions and it was therefore inappropriate to attempt to formally categorize such acts. Perhaps some rules or guidelines could be developed based on the practice regarding recognition of States and governments, though these would certainly not be as precise nor detailed as the norms in the area of treaty law.

274. However, another view stated that a possible dismissal of unilateral acts on grounds of absence of coherence and lack of legal character was weak since that position was contradicted by a vast array of evidence and the realities of international relations. Treaties themselves, it was said, could also be encompassed under the sociological reality of State interaction.

275. It was acknowledged that the topic was complex and that it posed some extremely difficult problems, such as the relationship of the topic to the law of treaties; the subject matter of unilateral acts being unusually susceptible to overlapping classifications; the issue of the informality of the acts; the fact that the concept of unilateral acts was too restrictive; and the absence of a clear legal position on unilateral acts in domestic legislation.

276. The view was expressed that the primary objective for the endeavour should be, not to describe every aspect of the institution of unilateral acts, but rather to determine what their legal effects were. Another matter to be decided was whether the Commission was going to codify unilateral acts alone or the behaviour of States as well. In this connection, it was noted that

if the scope of the topic was interpreted broadly, so as to include the conduct of States, the Commission's already extremely difficult endeavour could be practically impossible.

277. As regards the attempt by the Special Rapporteur to comply with the Commission's request by providing an analysis of the main unilateral acts before adopting some general conclusions, it was stated that the sixth report had not yielded the desired results, that the report lacked the requisite clarity, was repetitive and inconsistent with its predecessors. It was noted that the report failed to provide any proposals for future action and seemed to suggest abandoning the approach of elaborating draft articles in favour of less rigid guidelines. The main aspects of recognition were dealt with in the report, but on the basis of very theoretical and abstract propositions; a reference to fundamental academic writings on the topic would have been helpful. Moreover, the examination of State practice was limited. The analysis should focus on relevant State practice for each unilateral act, with regard to its legal effects, requirements for its validity and questions such as revocability and termination; State practice needed to be assessed so as to decide whether it reflected only specific elements or could provide the basis for some more general principles relating to unilateral acts. In addition, the report failed to focus on acts of recognition that had a direct bearing on the rules governing unilateral acts. It was also stated that, although addressing stimulating issues, the report drew the Commission away from its final objective, which was to determine to what extent recognition produced legal effects.

278. Some doubts were expressed about the methodology used by the Special Rapporteur. From his prior global approach he had shifted to a case by case study in order to identify general rules applicable to all unilateral acts. It was not clear how his monographic studies would tie in with the ultimate objective of the exercise, namely the elaboration of draft articles enabling States to realize when they ran the risk of being ensnared by the formal expression of their will. In this regard, it was suggested that the use of a detailed table with, horizontally, the various categories of unilateral acts and, vertically, the legal issues that needed to be addressed could be helpful. If common elements were found in the various categories, then general rules applicable to unilateral acts could be developed as the very substance of the draft articles.

279. On the other hand, it was stated that the preparation of an analytical table on unilateral acts would entail a great deal of effort, possibly with rather disappointing results and that the question at issue was exactly which unilateral acts the Commission should study. Pursuant to the original criterion established by the Commission some years ago the objective was not the study of unilateral acts per se, but as a source of international law.

280. According to another view, the crux of the matter lay in defining the *instrumentum* or procedure whereby an act or declaration of will gave rise to State responsibility, an objective which could not be done by studying the contents of individual acts or categories of acts. However, it was also pointed out that finding an *instrumentum* for a unilateral act was far more difficult than for a treaty.

281. Some concern was expressed about the continued discussion regarding methodology, despite the fact that work on the topic had begun in 1996.

282. Divergent views were expressed as to the best means of proceeding with the topic. It was suggested that the attempt to formulate common rules for all unilateral acts should be resumed and completed, before embarking on the second stage of work, which would consist in drawing up different rules applicable to specific subjects. On the other hand, it was felt that, based on State practice, unilateral acts which create international obligations could be identified and a certain number of applicable rules developed. The view was also expressed that the development of general principles in the form of treaty-type articles did not seem to correspond to the nature of the subject matter of the topic. Doubts were also voiced about the possibility of going beyond discerning general principles. According to another view, it was still premature to discuss the possible outcome of the Commission's endeavour.

283. The view was expressed that it was not solely the responsibility of the Special Rapporteur to find a way of furthering the progress of work on the topic and that the Commission as a whole should endeavour in assisting him to find a suitable approach for developing a set of rules on unilateral acts.

284. The view was expressed that the sixth report drew a false distinction between recognition as an institution and unilateral acts of recognition; it was considered impossible to examine one without the other. The concept of recognition and its relevance to unilateral acts needed to be more clearly defined. Doubts were expressed as to the proposition that a homogeneous unit called recognition existed.

285. Several limitations were pointed out as regards the attempt to apply the Vienna regime on treaties to unilateral acts. For example, in dealing with the conditions for recognition, the report adhered too rigidly to the practice followed in treaty-making.

286. Furthermore, it was said that the sixth report came close to examining recognition of States as an institution, a separate topic from the one the Commission had on its agenda.

287. The view was expressed that several issues raised in the report, inter alia, whether admission to the United Nations constituted a form of collective recognition, whether non-recognition was discretionary and whether the withdrawal of recognition was feasible in some circumstances, required further study. Although the Special Rapporteur had considered implied recognition as irrelevant to the study, it was noted that in light of the fact that no form was required for the act of recognition, it surely followed that implied recognition could exist.

288. It was also stated that the focus of the sixth report on the category of recognition of States was a poor choice and possibly counter-productive since it involved too many specific problems to be used as a basis for drawing conclusions. The view was expressed that both recognition of States and Governments was discretionary and that legal criteria were not applicable to them.

289. The point was made that the examples of non-recognition given in the report were not truly unilateral acts, because the legal obligation not to grant recognition in such instances stemmed from the relevant resolutions of organizations.

290. It was noted that the debate on whether recognition was declaratory or constitutive usually related to the consequences of recognition, not to its nature, the Special Rapporteur having followed the latter approach. Although the majority of writers considered recognition to be declaratory, that interpretation did not cover all cases: an examination of State practice led to

quite different conclusions. As a whole, the effects of recognition could be more constitutive than declaratory. Nonetheless, even if the recognition of States was declarative, what was true of recognition of States was not necessarily true of the recognition of other entities.

291. Some members highlighted the discretionary nature of recognition and the fact that it was increasingly accompanied by purely political criteria or conditions which went beyond traditional considerations.

292. It was pointed out that the effects of recognition could vary, depending on the specific type of recognition. For example, the effects of recognition of States were quite different from the recognition of the extension of a State's territorial jurisdiction. Besides the object of the recognition, the effects also depended on other parameters, such as the addressee's reaction. For example, if the addressee did not react, the State which had given the recognition was much freer to go back on that act. Therefore, different concepts could not be lumped together.

293. It was noted that distinctions between the various acts were not clear-cut. A discussion in the report on whether recognition was a form of acceptance or acquiescence or something else would have been useful. In this regard, reference was made to the fact that the International Court of Justice tended to understand "recognition" as being a form of acceptance or acquiescence; this did not provide adequate support for the existence of a specific consequence of recognition. Further research on the matter was thus required. Although the Special Rapporteur referred frequently to concepts similar to recognition, such as acquiescence and acceptance, they were by no means equivalent. The Special Rapporteur had also referred to acts of non-recognition, which, a priori, seemed to be more closely related to a different category, namely protest. Furthermore, silence and acquiescence were not synonymous, particularly in relation to territorial matters, and caution was required in dealing with such concepts when applied to the relationships between powerful and weaker States.

294. The point was also made that in discussing recognition of States, the Special Rapporteur had made no reference whatsoever to the classic distinction between de jure and de facto recognition, a distinction which posited various levels of the author State's capacity to go back on its recognition, de jure being definitive, whereas de facto was conditional.

295. Doubts were expressed over the assertion in the report that the modification, suspension or revocation of an act of recognition was feasible only if specific conditions were met.

296. As regards the effects of the establishment and suspension of diplomatic relations, the view was expressed that de facto recognition was not the same as implicit recognition, the former being provisional and without a binding legal act involved, whereas under a unilateral act a party signified its willingness to undertake certain obligations. The establishment of diplomatic relations might be considered as recognition equivalent to a legal act, but no more than that. It was stated that recognition through or as a result of the establishment of diplomatic relations or other agreements, as well as recognition resulting from decisions of an international organization, should be excluded from the report.

297. The view was expressed that the principle of *acta sunt servanda* adduced by the Special Rapporteur must be incorporated in the Commission's conclusions, but accompanied by a *rebus sic stantibus* clause, meaning that if a fundamental change of circumstance could affect the object of a unilateral act, then the unilateral act could also be affected. In addition, reference was made to the importance of the principle of good faith in the fulfilment of the obligations resulting from a unilateral act.

3. Special Rapporteur's concluding remarks

298. The Special Rapporteur noted that the debate had once again highlighted the difficulties posed by the topic, not just as regards the substance but also in relation to the methodology to be applied.

299. The vast majority of the members shared the view that unilateral acts do indeed exist. Nonetheless, there were members who felt that the scope of the topic should go beyond unilateral acts *stricto sensu* and encompass certain types of conduct of States that could produce legal effects.

300. He indicated that his sixth report had focused on recognition because the Commission had requested him to proceed along those lines in 2002, but that he had sought to expose the general characteristics of the unilateral act of recognition and not to present a study of the

institution of recognition per se. The main purpose of the sixth report was to show that the definition of the act of recognition corresponded to the draft definition of unilateral act, *stricto sensu*, analysed by the Commission in previous years.

301. The Special Rapporteur was not certain that the study of distinct types of unilateral acts was the best means to proceed. There was clearly an important divergence of views in the Commission on several issues. One of the main areas of disagreement regarded the scope of the topic with some members suggesting its extension so as to encompass State conduct, a change that would certainly have a bearing on the work contained in his prior reports which had excluded such conduct.

302. Recognition, subject to certain conditions, was frequently found in practice and merited additional study. Collective recognition, he pointed out, had been accepted by some States. As regards the revocation of a unilateral act, it could be concluded that a restrictive approach was best; to do so otherwise would call into question both the *acta sunt servanda* and the good faith principle.

C. Report of the Working Group

303. At its 2783rd meeting, on 31 July 2003, the Commission considered and adopted the recommendations contained in Parts 1 and 2 of the report of the Working Group,[196] reproduced below:

1. Scope of the topic

304. As a result of fairly lengthy discussions, the Working Group agreed on the following compromise text, which it adopted by consensus. Like any compromise, this text is based on mutual concessions between the positions involved: it does not completely satisfy anyone, but is acceptable to all.

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[196] A/CN.4/L.646.

305. The Working Group strongly recommends that the Commission regard the compromise text as a guide both for the Special Rapporteur's future work and for its own discussions, which should avoid calling it into question because, otherwise, the work on the topic will become bogged down once more and the errors of the past will be committed again, since the contradictory instructions given to the Special Rapporteur are partly responsible for the current situation.

306. In the Working Group's opinion, the consensus reached strikes a balance between the views which were expressed by its members and which reflect the differences of opinion in the Commission as a whole on the scope of the topic.

Recommendation 1

1. For the purposes of the present study, a unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law.

Recommendation 2

2. The study will also deal with the conduct of States which, in certain circumstances, may create obligations or other legal effects under international law similar to those of unilateral acts as described above.

Recommendation 3

3. In relation to unilateral acts as described in paragraph 1, the study will propose draft articles accompanied by commentaries. In relation to the conduct referred to in paragraph 2, the study will examine State practice and, if appropriate, may adopt guidelines/recommendations.

2. Method of work

307. The Working Group would have liked to be able to submit specific recommendations to the Commission on the method to be followed in achieving the objectives defined above. It was

unfortunately not able to do so within the time available to it and will simply make the following suggestions, which the Special Rapporteur might wish to take into account in his next report.

308. The Special Rapporteur, who is mainly responsible for these recommendations, informed the Working Group that, with the assistance of the University of Malaga and students from the International Law Seminar, he had already assembled a large amount of documentation on State practice.

Recommendation 4

4. The report which the Special Rapporteur will submit to the Commission at its next session will be exclusively as complete a presentation as possible of the practice of States in respect of unilateral acts. It should also include information originating with the author of the act or conduct and the reactions of the other States or other actors concerned.

Recommendation 5

5. The material assembled on an empirical basis should also include elements making it possible to identify not only the rules applicable to unilateral acts *stricto sensu*, with a view to the preparation of draft articles accompanied by commentaries, but also the rules which might apply to State conduct producing similar effects.

Recommendation 6

6. An orderly classification of State practice should, insofar as possible, provide answers to the following questions:

What were the reasons for the unilateral act or conduct of the State?

What are the criteria for the validity of the express or implied commitment of the State and, in particular, but not exclusively, the criteria relating to the competence of the organ responsible for the act or conduct?

In which circumstances and under which conditions can the unilateral commitment be modified or withdrawn?

Recommendation 7

7. In his next report, the Special Rapporteur will not submit the legal rules which may be deduced from the material thus submitted. They will be dealt with in later reports so that specific draft articles or recommendations may be prepared.

CHAPTER VIII

RESERVATIONS TO TREATIES

A. Introduction

309. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

310. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet, Special Rapporteur for the topic.[197]

311. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[198]

312. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[199] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice is concerned, it would take the

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[197] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[198] A/CN.4/470 and Corr.1.

[199] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

313. In 1995, the Commission, in accordance with its earlier practice,[200] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[201]

314. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report on the topic.[202] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[203] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

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[200] See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

[201] As of 31 July 2003, 33 States and 25 international organizations had answered the questionnaire.

[202] A/CN.4/477 and Add.1.

[203] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

315. At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic.

316. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[204]

317. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

318. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,[205] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[206]

319. At the fifty-first session, in 1999, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session and his fourth report on the topic.[207] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted in 1996 attached to his second report,[208]

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[204] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

[205] A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1.

[206] See *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 540.

[207] A/CN.4/499.

[208] A/CN.4/478/Rev.1.

was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[209]

320. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

321. At the fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,[210] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative declarations. At the same session, the Commission provisionally adopted five draft guidelines.[211] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur contained in documents A/CN.4/508/Add.3 and Add.4 to the following session.

322. At the fifty-third session, in 2001, the Commission initially had before it the second part of the fifth report (A/CN.4/508/Add.3 and Add.4) relating to questions of procedure regarding reservations and interpretative declarations and then the Special Rapporteur's sixth report (A/CN.4/518 and Add.1 to 3) relating to modalities for formulating reservations and interpretative declarations (including their form and notification) as well as the publicity of reservations and interpretative declarations (their communication, addressees and obligations of depositaries).

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[209] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

[210] A/CN.4/508/Add.1 to 4.

[211] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

323. At the same session the Commission provisionally adopted 12 draft guidelines.[212]

324. At the fifty-fourth session, in 2002, the Commission had before it the Special Rapporteur's seventh report (A/CN.4/526 and Add.1 to 3) relating to the formulation, modification and withdrawal of reservations and interpretative declarations. At the same session the Commission provisionally adopted 11 draft guidelines.[213]

325. At the same session, at its 2739th meeting held on 31 July 2002, the Commission decided to refer to the Drafting Committee draft guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of reservations), 2.5.5 (Competence to withdraw a reservation at the international level), 2.5.5 bis (Competence to withdraw a reservation at the internal level), 2.5.5 ter (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.6 bis (Procedure for communication of withdrawal of reservations), 2.5.6 ter (Functions of depositaries), 2.5.7 (Effect of withdrawal of a reservation), 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), 2.5.9 (Effective date of withdrawal of a reservation) (including the related model clauses), 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of partial withdrawal of a reservation).

B. Consideration of the topic at the present session

326. At the present session the Commission had before it the Special Rapporteur's eighth report (A/CN.4/535 and Add.1) relating to withdrawal and modification of reservations and interpretative declarations as well as to the formulation of objections to reservations and interpretative declarations.

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[212] Ibid., *Fifty-sixth session, Supplement No. 10* (A/56/10), para. 114.

[213] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 50.

327. The Commission considered the Special Rapporteur's eighth report at its 2780th to 2783rd meetings from 25 to 31 July 2003.

328. At its 2783rd meeting on 31 July 2003, the Commission decided to refer draft guidelines 2.3.5 "Enlargement of the scope of a reservation",[214] 2.4.9 "Modification of interpretative declarations", 2.4.10 "Modification of a conditional interpretative declaration", 2.5.12 "Withdrawal of an interpretative declaration" and 2.5.13 "Withdrawal of a conditional interpretative declaration" to the Drafting Committee.

329. At its 2760th meeting on 21 May 2003, the Commission considered and provisionally adopted draft guidelines 2.5.1 (Withdrawal of reservations), 2.5.2 (Form of withdrawal), 2.5.3 (Periodic review of the usefulness of reservations), 2.5.4 [2.5.5] (Formulation of the withdrawal of a reservation at the international level), 2.5.5 [2.5.5 bis, 2.5.5 ter] (Absence of consequences at the international level of the violations of internal rules regarding the withdrawal of reservations), 2.5.6 (Communication of withdrawal of a reservation), 2.5.7 [2.5.7, 2.5.8], (Effect of withdrawal of a reservation), 2.5.8 [2.5.9] (Effective date of withdrawal of a reservation) (together with model clauses A, B and C), 2.5.9 [2.5.10] (Cases on which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation), 2.5.10 [2.5.11] (Partial withdrawal of a reservation), 2.5.11 [2.5.12] (Effect of a partial withdrawal of a reservation). These guidelines had already been referred to the Drafting Committee at the fifty-fourth session.

330. At its 2786th meeting on 5 August 2003 the Commission adopted the commentaries to the aforementioned draft guidelines.

331. The text of these draft guidelines and the commentaries thereto are reproduced in section C.2 below.

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[214] Draft guideline 2.3.5 was referred following a vote.

1. Introduction by the Special Rapporteur of his eighth report

332. The eighth report on reservations to treaties (A/CN.4/535 and Add.1) was composed of an introduction, which relates to the consideration by the Commission of the seventh report, the reactions of the Sixth Committee and recent developments with regard to reservations to treaties, and a substantive part, which deals with the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations, on the one hand, and with the formulation of objections to reservations, on the other.

333. The Special Rapporteur recalled that, with the possible exception of draft guideline 2.1.8 on "Procedure in case of manifestly [impermissible] reservations", the Sixth Committee favourably welcomed the draft guidelines adopted at the fifty-fourth session. The discussion of draft guideline 2.5.X on the withdrawal of reservations held to be impermissible by a body monitoring the implementation of the treaty, which was withdrawn, was not very conclusive.

334. The Special Rapporteur referred to the document entitled "Preliminary opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights", which adopted an approach that is not at all dogmatic. The Committee on the Elimination of Racial Discrimination is trying to establish a dialogue with States to encourage the fullest possible implementation of the Convention. That was the main lesson the Special Rapporteur learned from the meeting between the members of the Commission and the members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights.[215] The Special Rapporteur also referred to the very positive fact that the Legal Service of the European Commission had finally replied to section I of the questionnaire on reservations.

335. With regard to the structure of the eighth report, the Special Rapporteur considered that it would be more logical for a chapter on objections to come before the chapter on the procedure for formulating the acceptance of reservations.

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[215] See A/CN.4/535, para. 18.

336. Chapter I dealt with the enlargement of the scope of reservations and the withdrawal and modification of interpretative declarations. The enlargement of the scope of reservations is clearly similar to the late formulation of reservations and the restrictions adopted in that case (guidelines 2.3.1 to 2.3.3) must therefore be transposed to cases of the assessment of the scope of reservations, as reflected, moreover, by modern-day practice, particularly of the Secretary-General of the United Nations. Draft guideline 2.3.5[216] thus simply refers to the rules applicable to the late formulation of reservations. On the basis of draft guideline 2.5.10, as recently adopted by the Commission and relating to the partial withdrawal of a reservation, paragraph 1 might contain a definition of enlargement.

337. With regard to the withdrawal and modification of interpretative declarations, State practice was fairly scarce. According to draft guideline 2.5.12,[217] States can withdraw simple interpretative declarations whenever they want, provided that that is done by a competent authority. Similarly, simple interpretative declarations can be modified at any time (draft

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[216] This draft guideline reads as follows:

> 2.3.5 *Enlargement of the scope of a reservation*
>
> The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3].

[217] This draft guideline reads as follows:

> 2.5.12 *Withdrawal of an interpretative declaration*
>
> Unless the treaty provides otherwise, an interpretative declaration may be withdrawn at any time following the same procedure as is used in its formulation and applied by the authorities competent for that purpose [in conformity with the provisions of guidelines 2.4.1 and 2.4.2].

guideline 2.4.9).[218] Since the rules relating to the modification of a simple interpretative declaration are the same as those relating to their formulation, the Special Rapporteur suggested that it would probably be enough to make slight changes in the text of and the commentaries to draft guidelines 2.4.3 and 2.4.6 (which have already been adopted) so that they combine the formulation and the modification of interpretative declarations.

338. Draft guidelines 2.5.13[219] and 2.4.10[220] relate to the withdrawal and modification of conditional interpretative declarations. The Special Rapporteur considered that it was difficult to determine whether the modification of an interpretative declaration, whether conditional or not, strengthens it or limits it and that any modification of conditional interpretative declarations should therefore follow the regime applicable to the late formulation or strengthening of a reservation and be subordinate to the lack of any "objections" by any of the other Contracting Parties. However, the withdrawal of conditional interpretative declarations seems to have to follow the rules relating to the withdrawal of reservations.

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[218] This draft guideline reads as follows:

> 2.4.9 *Modification of interpretative declarations*
>
> Unless the treaty provides that an interpretative declaration may be made [or modified] only at specified times, an interpretative declaration may be modified at any time.

[219] This draft guideline reads as follows:

> 2.5.13 *Withdrawal of a conditional interpretative declaration*
>
> The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of a reservation to a treaty [given in guidelines 2.5.1 to 2.5.9].

[220] This draft guideline reads as follows:

> 2.4.10 *Modification of a conditional interpretative declaration*
>
> A State or an international organization may not modify a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late modification of the conditional interpretative declaration.

339. Chapter II relates to the formulation of objections, which are not defined anywhere. The Special Rapporteur considered that one element of the definition should be the moment when objections must be made, a question dealt with indirectly in the 1969 and 1986 Vienna Conventions (art. 20, para. 5). Intention, which is the key element of an objection, as shown by the decision handed down by the arbitral tribunal in the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *Mer d'Iroise* case, is a complex issue. Draft guideline 2.6.1[221] proposes a definition of objections taking account of theoretical considerations and the study of practice. At the same time, it leaves out a number of elements, one of which is the question whether or not a State or an international organization formulating an objection must be a contracting party and which will be dealt with in a later study. The proposed definition also does not take a stance on the validity of objections. Draft

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[221] This draft guideline reads as follows:

> 2.6.1 *Definition of objections to reservations*
>
> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

Another possibility would be a draft guideline including draft guideline 2.6.1 ter and reading as follows:

> 2.6.1 *Definition of objections to reservations*
>
> "Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.

guideline 2.6.1 bis[222] is intended to eliminate the confusion over terminology as a result of which the Commission uses the word "objection" to mean both an objection to a reservation and opposition to the formulation of the late reservation. Draft guideline 2.6.1 ter[223] completes the definition of objections by referring to objections to "across-the-board" reservations (draft guideline 1.1.1).

2. Summary of the debate

340. Most of the draft guidelines proposed by the Special Rapporteur were endorsed, subject to some clarifications or minor amendments. Several members also expressed their satisfaction with the exchange of views between the Commission and the human rights treaty monitoring bodies. The debate focused primarily on draft guidelines 2.3.5 (Enlargement of the scope of a reservation) and 2.6.1 (Definition of objections to reservations).

341. Several members indicated that the definition of objections to reservations related to the substance of a number of interesting questions.

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[222] This draft guideline reads as follows:

> 2.6.1 bis *Objection to late formulation of a reservation*
>
> "Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.

[223] This draft guideline reads as follows:

> 2.6.1 ter *Object of objections*
>
> When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection, an objection purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation.

342. Some members were of the opinion that the Special Rapporteur's proposal was, quite rightly, entirely in line with the Vienna Conventions and was intended only to adapt the 1969 and 1986 definition of reservations to objections. They considered that the intention of the objecting State, a key element of the proposed definition, had to be in keeping with article 21, paragraph 3, and article 20, paragraph 4 (b), of the 1969 Vienna Convention on the Law of Treaties. The definition must not include "quasi-objections" or the expression of "wait-and-see" positions in relation to a reservation.

343. According to another point of view, the definition proposed by the Special Rapporteur was not entirely satisfactory.

344. It was pointed out that the legal effects of an objection to a reservation under the Vienna Conventions were uncertain and could even be likened to those of acceptance, in the sense that the provision to which the reservation relates does not apply. However, the objecting State's intention is obviously not to accept the reservation, but, rather, to encourage the reserving State to withdraw it. The definition of objections should therefore reflect the real intention of the objecting State and not tie that position to the effects attributed to objections under the Vienna Conventions.

345. The practice of States shows that objecting States sometimes have effects in mind that are different from those provided for in articles 20 and 21 of the Vienna Conventions. There can also be different types of objections: those purporting to exclude only the provision to which the reservation relates, but also an entire part of the treaty; those which state that a reservation is contrary to the object and purpose of the treaty, but nevertheless allow for the establishment of treaty relations between the reserving State and the objecting State; and even objections to "across-the-board reservations" purporting to prevent the application of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation. (The latter category was covered by draft guideline 2.6.1 ter). The intention of the objecting State was usually to ensure that a reservation could not be opposable to it. According to that viewpoint, the definition of objections contained in draft guideline 2.6.1 should therefore be broadened.

346. In that connection, it was recalled that the regime of objections was very incomplete. According to one point of view, the proposal that an objection applying the doctrine of severability ("super-maximum" effect) was not actually an objection was contrary to one of the basic principles of the Vienna Conventions, namely, that the intention of States took precedence over the terms used. Other members take the view that, although independent bodies (such as the European Court of Human Rights and the Inter-American Court of Human Rights) hand down rulings on the permissibility of reservations, the doctrine of severability is still controversial, especially if it is applied by States (in the case of human rights treaties, in particular). In this case, States want to preserve the integrity of the treaty, sometimes at the expense of the principle of consensus.

347. According to this point of view, even controversial objections should always be regarded as objections, despite uncertainty about their legal consequences. The definition of objections should therefore be much broader and include all types of unilateral responses to reservations, including those purporting to prevent the application of the treaty as a whole, and those known as "quasi-objections". The Commission should also reconsider the 1997 preliminary conclusions in the light of recent practice, which took account of the specific object and purpose of the treaty. A careful balance should be struck between the consent of sovereign States and the integrity of treaties.

348. Some members pointed out that only an analysis of the text of the objection would reveal the intention behind it. According to another point of view, an analysis of the context shows whether what is involved is an objection proper or some other kind of response to get the reserving State to withdraw its reservation. In that connection, however, reference was also made to recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe on responses to inadmissible reservations to international treaties as a means of analysing the intention of the objecting State. That recommendation by a regional organization showed that there was an emerging practice in respect of objections.

349. It was also noted that the intention should not be limited, as it was in the Special Rapporteur's proposal, and that, if the intention was linked to the effects of the objection, the question of the definition should be postponed until the effects of reservations and objections had been considered. According to another point of view, the Special Rapporteur had followed the Vienna Conventions too slavishly and restrictively. The practice of States should also be taken into account. The definition of objections should be much more flexible. That very complex question was a matter of the progressive development of international law.

350. It was also considered that, while the definition of objections should take account of *intention*, it could be elaborated without reference to the *effects* of objections. In order to avoid a complex and cumbersome definition, a choice would have to be made between the elements to be included. In any event, a distinction should be made between objections to "impermissible" reservations and objections to "permissible" reservations. The effects of objections to those two categories of reservations should be dealt with separately. It was also considered that the case where the provision to which the reservation relates is a customary rule should be set aside.

351. The view was expressed that the definition of an objecting State should be based on article 23, paragraph 1, and include States or international organizations entitled to become parties to the treaty.

352. There was general support for the Special Rapporteur's proposal that a draft guideline should be prepared to encourage States to give the reasons for their objections.

353. With regard to draft guideline 2.3.5, some members said that they were surprised and concerned at the possibility of the enlargement of the scope of a reservation. In their opinion, there was a basic difference between the late formulation of a reservation and the enlargement of its scope. In the first case, the State forgot, in good faith, to append the reservation to its instrument of ratification, while, in the second, a dangerous course is being charted for treaties and international law in general. The reservation is in fact a new one which jeopardizes international legal certainty and is contrary to the definition of reservations contained in the Vienna Conventions. It is thus an abuse of rights that must not be authorized. It was also

questioned whether any legitimate reasons can justify the enlargement of a reservation. It was therefore not accurate to say that the draft guidelines on the late formulation of a reservation are applicable to the enlargement of reservations.

354. Consequently, according to this opinion, the practice of the Secretary-General of the Council of Europe should be followed and the enlargement of the scope of the reservation should be prohibited; this draft guideline should either not be included in the Guide to Practice or should lay down very strict requirements. States should be requested to give their opinions on this practice. According to one view, the guideline contradicted draft guideline 2.3.4 ("Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations") since it was never possible to give a broader interpretation to a reservation made earlier, even if the parties to the treaty agreed to it. During the second reading of the draft guidelines, moreover, the Commission should restrict the possibility of formulating a late reservation.

355. The majority of members nevertheless agreed that the enlargement of the scope of a reservation should be treated as the late formulation of a reservation, since the restrictions applicable to the late formulation of a reservation should definitely be maintained. In that regard, it was noted that guideline 2.3.3 on objections to late formulation of a reservation had to be adapted to the case of the enlargement of a reservation because, in the case of an objection, the reservation is kept in its original form. Ruling out the possibility of the enlargement of reservations would be much too rigid an approach. It would also not be wise to impose a regional practice on the rest of the world.

356. Several members were of the opinion that a second paragraph should be added on the definition of enlargement.

357. As to the question of terminology, several members agreed with the Special Rapporteur that a distinction should be made between an objection to the reservation and opposition to the procedure for the formulation of a late reservation. At present, the Commission should not go back on decisions already adopted.

358. Several members supported the draft guidelines on the modification and withdrawal of interpretative declarations (simple and conditional), while stating that conditional interpretative declarations should be treated as reservations. According to one point of view, the Commission should prepare a draft guideline restricting modification in the sense of the enlargement of interpretative declarations.

359. The members were generally in favour of the exchange of views established between the Commission and the human rights treaty monitoring bodies. Several members also drew attention to the importance of the "reservations dialogue", on which the Special Rapporteur intended to submit draft guidelines at the next session.

3. Special Rapporteur's concluding remarks

360. At the end of the debate, the Special Rapporteur said that the Commission should not go back on its own decisions and call into question draft guidelines that had already been adopted. The draft guidelines on the late formulation of reservations, already adopted in 2001, should not be called into question because some members were not convinced that the rules on the enlargement of a reservation could be brought into line with those applicable to late formulation. The draft guideline on the enlargement of a reservation accurately reflected the practice of which he had given examples in his eighth report. He was not sure that States necessarily enlarged a reservation in bad faith. There were cases where that could be justified by purely technical or legislative considerations. He also recalled that the opposition of a single State would prevent the reservation from being enlarged.

361. He did not understand why the strict practice of the Secretary-General of the Council of Europe as depositary (which was, incidentally, less strict than had been claimed) would be imposed on the rest of the world; in his opinion, the practice of the Secretary-General of the United Nations, which was more flexible, would be more suitable. In any event, as far as the enlargement of reservations was concerned, there was thus no reason to depart from the rules on the late formulation of reservations.

362. With regard to draft guideline 2.6.1 on the definition of objections, the Special Rapporteur had listened with great interest to the various opinions that had been expressed. He nevertheless wished to dispel some confusion about recommendation No. R (99) 13 of the Committee of Ministers of the Council of Europe: those model responses to inadmissible reservations were quite clearly all *objections* and they used that term. However, that is not always the case of the responses of States to reservations and it must not be assumed that, when the author of a response to a reservation uses unclear or ambiguous terms, that response is an objection. As the 1977 Court of Arbitration stated, a response to a reservation is not necessarily an objection. The reservations dialogue must not be a pretext for uncertainties or misunderstandings. Reserving States and others, whether they object or not, must know where they stand and what the real objections are by comparison with responses to reservations which are not objections.

363. The Special Rapporteur considered that the *intention* of States or international organizations was a key element of the definition of objections, as the majority of the members seemed to agree. That intention was obviously to prevent any effects of a reservation from being opposable to the objecting State. In that connection, he found that objections with super-maximum effects took such an intention to its extreme limits because, for all practical purposes, it "destroyed" the reservation and he continued to have doubts about the validity of that practice. In any event, as reservations had been defined without taking account of their permissibility, the same should probably be done with the definition of objections, without worrying about their validity. He therefore proposed the following new wording for draft guideline 2.6.1:

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects."

364. The Special Rapporteur proposed either that the new wording of draft guideline 2.6.1 should be referred to the Drafting Committee or that the Commission should give it further consideration and come back to it next year. He noted that all of the members who had spoken on the other draft guidelines on the withdrawal and amendment of interpretative declarations had supported them, subject to some minor drafting improvements.

365. In conclusion, the Special Rapporteur recalled that the Commission would still have to be patient about the question of conditional interpretative declarations. Although they were not reservations (see guideline 1.2.1), they seemed to act like reservations. Further progress on the topic would have to be made in order to determine whether that separate category was subject to the same rules as reservations.

366. In view of the interest expressed by several members, the Special Rapporteur intended to submit a draft guideline that would encourage objecting States to state their reasons for formulating their objections.

C. Text of draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of draft guidelines

367. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to Practice

Explanatory note

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

1. Definitions

1.1 Definition of reservations[224]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4] [225] Object of reservations[226]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[227]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

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[224] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[225] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[226] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[227] For the commentary to this draft guideline, see ibid., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

1.1.3 [1.1.8] Reservations having territorial scope[228]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[229]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[230]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means[231]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

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[228] For the commentary to this draft guideline, see ibid., pp. 206-209.

[229] For the commentary to this draft guideline, see ibid., pp. 209-210.

[230] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

[231] For the commentary to this draft guideline, see ibid., pp. 222-223.

1.1.7 [1.1.1] Reservations formulated jointly[232]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[233]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of interpretative declarations[234]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[235]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a

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[232] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[233] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10*, (A/55/10), pp. 230-241.

[234] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[235] For the commentary to this draft guideline, see ibid., pp. 240-249.

State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[236]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[237]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[238]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

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[236] For the commentary to this draft guideline, see ibid., pp. 249-252.

[237] For the commentary to this draft guideline, see ibid., pp. 252-253.

[238] For the commentary to this draft guideline, see ibid., pp. 254-260.

1.3.2 [1.2.2] Phrasing and name[239]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[240]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[241]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[242]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

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[239] For the commentary to this draft guideline, see ibid., pp. 260-266.

[240] For the commentary to this draft guideline, see ibid., pp. 266-268.

[241] For the commentary to this draft guideline, see ibid., pp. 268-270.

[242] For the commentary to this draft guideline, see ibid., pp. 270-273.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[243]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[244]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[245]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[246]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

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[243] For the commentary to this draft guideline, see ibid., pp. 273-274.

[244] For the commentary to this draft guideline, see ibid., pp. 275-280.

[245] For the commentary to this draft guideline, see ibid., pp. 280-284.

[246] For the commentary to this draft guideline, see ibid., pp. 284-289.

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause[247]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[248]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[249]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[250]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

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[247] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[248] For the commentary to this draft guideline, see ibid., pp. 247-252.

[249] For the commentary, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[250] For the commentary to this draft guideline, see ibid., pp. 290-302.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[251]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of bilateral treaty by the other party[252]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[253]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

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[251] For the commentary to this draft guideline, see ibid., pp. 302-306.

[252] For the commentary to this draft guideline, see ibid., pp. 306-307.

[253] For the commentary to this draft guideline, see ibid., pp. 308-310.

1.7 Alternatives to reservations and interpretative declarations[254]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[255]

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations[256]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

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[254] For the commentary see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[255] For the commentary to this draft guideline, see ibid., pp. 253-269.

[256] For the commentary to this draft guideline, see ibid., pp. 270-272.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[257]

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation[258]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[259]

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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[257] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10) pp. 63-67.

[258] For the commentary to this draft guideline, see ibid., pp. 67-69.

[259] For the commentary to this draft guideline, see ibid., pp. 69-75.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 [2.1.3 bis, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[260]

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

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[260] For the commentary to this draft guideline, see ibid., pp. 75-79.

2.1.5 Communication of reservations[261]

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[262]

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary.

The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

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[261] For the commentary to this draft guideline, see ibid., pp. 80-93.

[262] For the commentary to this draft guideline, see ibid., pp. 94-104.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[263]

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

(*b*) Where appropriate, the competent organ of the international organization concerned.

2.1.8 [2.1.7 bis] Procedure in case of manifestly [impermissible] reservations[264]

Where, in the opinion of the depositary, a reservation is manifestly [impermissible], the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

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[263] For the commentary to this draft guideline, see ibid., pp. 105-112.

[264] For the commentary to this draft guideline, see ibid., pp. 112-114.

2.2.1 Formal confirmation of reservations formulated when signing a treaty[265]

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[266]

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[267]

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

...[268]

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[265] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

[266] For the commentary to this draft guideline, see ibid., pp. 472-474.

[267] For the commentary to this draft guideline, see ibid., pp. 474-477.

[268] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

2.3.1 Late formulation of a reservation[269]

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of late formulation of a reservation[270]

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation[271]

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations[272]

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

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[269] For the commentary to this draft guideline, see ibid., pp. 477-489.

[270] For the commentary to this draft guideline, see ibid., pp. 490-493.

[271] For the commentary to this draft guideline, see ibid., pp. 493-495.

[272] For the commentary to this draft guideline, see ibid., pp. 495-499.

2.4 Procedure for interpretative declarations[273]

2.4.1 Formulation of interpretative declarations[274]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 bis] Formulation of an interpretative declaration at the internal level[275]

The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.3 Time at which an interpretative declaration may be formulated[276]

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

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[273] For the commentary see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[274] For the commentary to this draft guideline, see ibid., pp. 115-116.

[275] For the commentary to this draft guideline, see ibid., pp. 117-118.

[276] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[277]

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[278]

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

2.4.6 [2.4.7] Late formulation of an interpretative declaration[279]

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[280]

A conditional interpretative declaration must be formulated in writing.

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[277] For the commentary to this draft guideline, see ibid., pp. 501-502.

[278] For the commentary to this draft guideline, see ibid., pp. 502-503.

[279] For the commentary to this draft guideline, see ibid., pp. 503-505.

[280] For the commentary to this draft guideline, see ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

Formal confirmation of a conditional interpretative declaration must also be made in writing.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

2.4.8 Late formulation of a conditional interpretative declaration[281]

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[282]

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

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[281] For the commentary to this draft guideline, see ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

[282] For commentary see section C.2 below.

2.5.2 Form of withdrawal[283]

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations[284]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[285]

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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[283] Ibid.

[284] Ibid.

[285] Ibid.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[286]

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of withdrawal of a reservation[287]

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

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[286] Ibid.

[287] Ibid.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[288]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[289]

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model clauses[290]

A. Deferment of the effective date of the withdrawal of a reservation

A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].

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[288] Ibid.

[289] Ibid.

[290] Ibid.

B. Earlier effective date of withdrawal of a reservation[291]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to set the effective date of withdrawal of a reservation[292]

A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[293]

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

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[291] Ibid.

[292] Ibid.

[293] Ibid.

2.5.10 [2.5.11] Partial withdrawal of a reservation[294]

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[295]

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2. Text of the draft guidelines with commentaries thereto adopted at the fifty-fifth session of the Commission

368. The texts of draft guidelines with commentaries thereto adopted by the Commission at its fifty-fifth session are reproduced below.

Explanatory note

Some draft guidelines in the Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

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[294] Ibid.

[295] Ibid.

Commentary

(1) The Commission considered that it would be useful to place "explanatory notes" at the beginning of the Guide to Practice in order to provide information to users of the Guide on its structure and purpose. Other questions that might arise in future could also be included in these preliminary notes.

(2) The purpose of this first explanatory note is to define the function and the "instructions for use" of the model clauses that accompany some draft guidelines, in accordance with the decision taken by the Commission at its forty-seventh session.[296]

(3) These model clauses are intended mainly to give States and international organizations examples of provisions that it might be useful to include in the text of a treaty in order to avoid the uncertainties or drawbacks that might result, in a particular case, from silence about a specific problem relating to reservations to that treaty.

(4) Model clauses are alternative provisions from among which negotiators are invited to choose the one best reflecting their intentions, on the understanding that they may adapt them, as appropriate, to the objectives being sought. It is therefore essential to refer to the commentaries to these model clauses in determining whether the situation is one in which their inclusion in the treaty would be useful.

2.5 Withdrawal and modification of reservations and interpretative declarations

Commentary

(1) The purpose of the present section of the Guide to Practice is to specify the conditions of substance and of form in which a reservation may be modified or withdrawn.

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[296] See the Report of the Commission at its forty-seventh session, *Yearbook ... 1995,* vol. II, Part Two, p. 108, para. 487 (b).

(2) As in the case of the Guide as a whole, the point of departure of the draft guidelines included in this section is constituted by the provisions of the 1969 and 1986 Vienna Conventions on the question under consideration. These provisions are article 22, paragraphs 1 and 3 (a), and article 23, paragraph 4, which deal only with the question of withdrawal of reservations, not with that of their modification. The Commission endeavoured to fill this gap by proposing guidelines on declarations of parties to a treaty intended to modify the content of a reservation made previously, whether the purpose of the modification is to limit or strengthen its scope.[297]

(3) The Commission deemed it appropriate, for the convenience of users, to include all the draft guidelines on the withdrawal of reservations in section 2.5, without restricting it to procedure, the subject of chapter 2 of the Guide. Draft guidelines 2.5.7 [2.5.7, 2.5.8] and 2.5.11 [2.5.12] thus relate to the effect of the withdrawal, in whole or in part, of a reservation.

2.5.1 Withdrawal of reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

Commentary

(1) Draft guideline 2.5.1 reproduces the text of article 22, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which is itself based on that of article 22, paragraph 1, of the 1969 Vienna Convention, with the addition of international organizations. These provisions were hardly discussed during the *travaux préparatoires*.

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[297] See draft guidelines 2.5.10 [2.5.11] and 2.5.11 [2.5.12].

(2) The question of the withdrawal of reservations did not attract the attention of Special Rapporteurs on the law of treaties until fairly recently and even then only to a limited degree. J.L. Brierly and Sir Hersch Lauterpacht were preoccupied with admissibility of reservation and did not devote a single draft article to the question of the criterion for the withdrawal of reservations.[298] It was not until 1956 that, in his first report, Sir Gerald Fitzmaurice proposed the following wording for draft article 40, paragraph 3:

> A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with the provision by the other parties.[299]

(3) The draft was not discussed by the Commission, but, in his first report, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled "Power to formulate and withdraw reservations",[300] which posited the principle of the "absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States":[301]

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[298] The furthest Lauterpacht went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the "Covenant of Human Rights", expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations (second report on the law of treaties, A/CN.4/87, para. 7; *Yearbook ... 1954*, vol. II, pp. 131-132).

[299] *Yearbook ... 1956,* vol. II, p. 116, document A/CN.4/101. In his commentary on this provision, Sir Gerald Fitzmaurice restricted himself to saying that it did not require any explanation (ibid., p. 131, para. 101).

[300] *Yearbook ... 1962*, vol. II, p. 61.

[301] Ibid., p. 75, document A/CN.4/144, para. (12) of the commentary to article 17.

> A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.[302]

This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with "The withdrawal of reservations", no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.[303] This draft was adopted with the addition of a provision in the first paragraph specifying when the withdrawal took legal effect.[304] According to draft article 22 on first reading:

> "1. A reservation may be withdrawn at any time and the consent of the State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.
>
> 2. Upon withdrawal of the reservation, the provisions of article 21 cease to apply."[305]

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[302] Paragraph 6 of draft article 17, ibid., p. 61.

[303] At the request of Bartoš (*Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67).

[304] Ibid., paras. 69-71 and 667th meeting, 25 June 1962, p. 253, paras. 73-75.

[305] *Yearbook ... 1962*, vol. II, p. 181, document A/5209; article 21 related to "The application of reservations".

(4) Only three States reacted to draft article 22,[306] which was consequently revised by the Special Rapporteur. He proposed that:[307]

> The provision should take the form of a residual rule;
>
> It should be specified that notification of a withdrawal should be made by the depositary, if there was one;
>
> A period of grace should be allowed before the withdrawal became operative.[308]

(5) During the consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.[309] This proposition received little support and the majority favoured the notion, expressed by Bartoš, that "normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated".[310]

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[306] Fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, p. 55, document A/CN.4/177 and Add.1 and 2. Israel considered that notification should be through the channel of the depositary, while the United States of America welcomed the "provision that the withdrawal of the reservation 'takes effect when notice of it has been received by the other States concerned'"; the comment by the United Kingdom of Great Britain and Northern Ireland related to the effective date of the withdrawal; see commentary to draft guideline 2.5.8, para. (4), below. For the text of the comments by the three States, see *Yearbook ... 1966*, vol. II, pp. 351 (United States), 295 (Israel, para. 14) and 344 (United Kingdom).

[307] For the text of the draft article proposed by Waldock, see ibid., p. 56, or *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 43.

[308] On this point, see commentary to draft guideline 2.5.8, para. (4).

[309] See the comments by Verdross and (less clearly) Amado, 800th meeting, 11 June 1965, p. 175, para. 49, and p. 176, para. 60.

[310] Ibid., p. 175, para. 50.

Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.[311] The new text was the one eventually adopted[312] and it became the final version of draft article 20 ("Withdrawal of reservations"):

> "1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
>
> 2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States."[313]

(6) The commentary to the provision was, apart from a few clarifications, a repetition of that of 1962.[314] The Commission expressed the view that the parties to the treaty "ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty".[315]

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[311] See para. (3) above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22.

[312] See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56-60, and *Yearbook ... 1966*, vol. I, Part Two, p. 327, para. 106.

[313] *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, p. 162, document A/6009).

[314] See para. (3) above.

[315] *Yearbook ... 1966*, vol. II, p. 209.

(7) At the Vienna Conference, the text of this draft article (which had by now become article 22 of the Convention) was incorporated unchanged, although several amendments of detail had been proposed.[316] However, on the proposal of Hungary, two important additions were adopted:

> First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;[317] and,
>
> Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.[318]

(8) Basing himself on the principle that "there is no reason to put international organizations in a situation different from that of States in the matter of reservations", Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting "draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention to agreements to which international organizations are parties", subject only to "minor drafting

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[316] See the list and the text of these amendments and sub-amendments in the report of the Committee of the Whole, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 141-142, paras. 205-211.

[317] For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records* ..., supra, note 316, p. 267; for the discussion of it, see the debates at the 11th plenary meeting of the Conference (30 April 1969) in *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 36-38, paras. 14-41.

[318] On this amendment, see the commentary to draft guideline 2.5.2, para. (2).

changes".[319] So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.[320] These proposals were adopted by the Commission without amendment[321] and retained on second reading.[322] The 1986 Vienna Conference did not bring about any fundamental change.[323]

(9) It appears from the provisions thus adopted that the withdrawal of a reservation is a unilateral act. This puts an end to the once deeply debated theoretical question of the legal nature of withdrawal: is it a unilateral decision or a conventional act?[324] Article 22, paragraph 1,

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[319] *Yearbook ... 1975*, vol. II, pp. 36 and 37, document A/CN.4/285, para. (5) of the general commentary on sect. 2.

[320] Ibid., p. 38, and fifth report, *Yearbook ... 1976*, vol. II, Part One, p. 146.

[321] See the Commission's discussions in 1977: 1434th meeting, 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 100-101, paras. 30-34; 1435th meeting, 7 June 1977, ibid., p. 103, paras. 1 and 2; 1451st meeting, 1 July 1977, ibid., pp. 194-195, paras. 12-16; and the report of the Commission, *Yearbook ... 1977*, vol. II, Part Two, pp. 114-115.

[322] States and international organizations made no comment on these provisions. See the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II, Part One, pp. 63-64; the Commission's discussions: 1652nd meeting, 15 May 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27-29; 1692nd meeting, 16 July 1981, ibid., pp. 264-265, paras. 38-41; the report of the Commission, *Yearbook ... 1981*, vol. II, Part Two, p. 140; and the final report for 1982, *Yearbook ... 1982*, vol. II, Part Two, p. 37.

[323] See *Official Records of the United Nations Conference on the Law of Treaties between States and international organizations or between international organizations, Vienna*, 18 February-21 March 1986, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), fifth plenary meeting, 18 March 1986, p. 14, paras. 62-63.

[324] On this disagreement on the theory, see particularly P.H. Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 288, or Frank Horn, *Reservations and Interpretative Declarations*, T.M.C. Asser Instituut, 1988, pp. 223-224, and the references cited. For a muted comment on this disagreement during the *travaux préparatoires* on article 22, see para. (5) above.

of the two Vienna Conventions rightly opts for the first of these positions. As the International Law Commission stated in the commentary to the draft articles adopted on first reading:[325]

> "It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a regime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted."[326]

(10) This is still the Commission's view. By definition, a reservation is a unilateral[327] act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations,[328] but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateral action.

(11) It could perhaps be argued that, in accordance with article 20 of the Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty is effective only for the parties which have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation - it gives effect to it, but the reservation is still a distinct unilateral act - and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,[329] the signatories to a

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[325] See para. (3) above.

[326] *Yearbook ... 1962*, vol. II, pp. 181-182, document A/5209, para. (1) of the commentary to art. 22.

[327] Cf. art. 2, para. 1 (d), of the Vienna Conventions and draft guideline 1.1 of the Guide to Practice.

[328] Cf. draft guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4].

[329] See para. (5) above.

multilateral treaty expect, in principle, that it will be accepted as a whole and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,[330] is never forbidden under a treaty.[331]

(12) Furthermore, to the best of the Commission's knowledge, the unilateral withdrawal of reservations has never given rise to any particular difficulty and none of the States or international organizations which replied to the Commission's questionnaire on reservations[332] has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,[333] or aim to encourage withdrawal by urging States to withdraw them "as soon as circumstances permit".[334] In the same spirit, international organizations and the human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.[335]

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[330] See the commentary to draft guidelines 2.5.7 [2.5.7, 2.5.8] and 2.5.8 [2.5.9].

[331] Cf. Luigi Migliorino, "La revoca di reserve e di obiezioni a riserve", *Rivista di diritto internazionale*, 1994, p. 319.

[332] See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

[333] See the examples given by P.H. Imbert, supra, note 324, p. 287, note 19, or by F. Horn, supra, note 324, p. 437, note 1. See also, for example, the Convention relating to the Status of Refugees, of 28 July 1951, art. 42, para. 2; the Convention on the Continental Shelf, of 29 April 1958, art. 12, para. 1; the European Convention on Establishment, of 13 December 1955, art. 26, para. 3; or the 1962 model clause of the Council of Europe, which appears in "Models of final clauses", given in a Memorandum of the Secretariat (CM (62) 148, 13 July 1962, pp. 6 and 10).

[334] See, for example, the European Patent Convention (Munich Convention) of 5 October 1973, art. 167, para. 4, and other examples cited by P.H. Imbert, supra, note 324, p. 287, note 20, or by F. Horn, supra, note 324, p. 437, note 2.

[335] See the examples cited in the commentary to draft guideline 2.5.3, infra, note 369.

(13) Such objectives also justify the fact that the withdrawal of a reservation may take place "at any time",[336] which could even mean before the entry into force of a treaty by a State which withdraws a previous reservation,[337] although the Special Rapporteur knows of no case in which this has occurred.[338]

(14) The now customary nature of the rules contained in article 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 2.5.1 seems not to be in question[339] and is in line with current practice.[340]

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[336] One favoured occasion for the withdrawal of reservations is at the time of the succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (cf. the 1978 Vienna Convention on Succession of States in respect of Treaties, art. 20, para. 1). This situation will be examined during the general consideration of the fate of reservations and interpretative declarations in the case of succession of States.

[337] This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol and the Customs Convention on the Temporary Importation of Private Road Vehicles, all of 4 June 1954 (para. 5); see *Yearbook ... 1965*, vol. II, p. 105, document A/5687, Part Two, annex II, para. 2. There are a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (cf. the examples given by F. Horn, supra, note 324, pp. 345-346); but these are not strictly speaking withdrawals: see commentary to draft guideline 2.5.2, paras. (7) and (8).

[338] On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia's reply to question 1.6.2.1 of the Commission's questionnaire: the restrictions on its acceptance of annexes III-V of the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL Convention) (as modified by its Protocol of 1978), to which it had acceded on 2 December 1991, were lifted on 28 July 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the 1959 Agreement Establishing the Inter-American Development Bank.

[339] Cf. L. Migliorino, supra, note 331, pp. 320-321, or Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 313.

[340] Cf. the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs, United Nations, 1997, ST/LEG/8,

(15) The wording chosen does not call for any particular criticism, although some fault could be found with the first phrase ("Unless the treaty provides otherwise …"), which some members of the Commission have suggested should be deleted. This explanatory phrase, which appeared in the Commission's final draft, but not in that of 1962,[341] was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments[342] and endorsed by the Drafting Committee at the seventeenth session in 1965.[343] It goes without saying that most of the provisions of the Vienna Conventions and all the rules of a procedural nature contained in them are of a residual, voluntary nature and must be understood to apply "unless the treaty otherwise provides". The same must therefore be true, a fortiori, of the Guide to Practice. The explanatory phrase that introduces article 22, paragraph 1, may seem superfluous, but most members of the Commission take the view that this is not sufficient cause for modifying the wording chosen in 1969 and retained in 1986.

(16) This phrase, with its reference to treaty provisions, seems to suggest that model clauses should be included in the Guide to Practice. The issue is, however, less to do with procedure as such so much as with the effect of a withdrawal; the allusion to any conflict with treaty provisions is really just a muted echo of the concerns raised by some members of the Commission and some Governments about the difficulties that might arise from the sudden

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Sales No. E.94.V.15, p. 64, para. 216. The few States which made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States) or a reassessment of their interests (Israel). On reasons for withdrawal, see Jean-François Flauss, "Note sur le retrait par la France des réserves aux traités internationaux", *AFDI*, 1986, pp. 860-861.

[341] See paras. (3) and (5) above.

[342] Fourth report on the law of treaties, *Yearbook … 1965*, vol. II, pp. 55-56; see also ibid., vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

[343] Ibid., 814th meeting, 29 June 1965, p. 272, para. 22.

withdrawal of a reservation.[344] To meet those concerns, it might be wise to incorporate limitations on the right to withdraw reservations at any time in a specific provision of the treaty.[345]

2.5.2 Form of withdrawal

The withdrawal of a reservation must be formulated in writing.

Commentary

(1) The draft guideline reproduces the wording of article 23, paragraph 4, which is worded in the same way in both the 1969 and the 1986 Vienna Conventions.

(2) Whereas draft article 17, paragraph 7, adopted on first reading by the Commission in 1962 required that the withdrawal of a reservation should be effected "by written notification",[346] the 1966 draft was silent regarding the form of withdrawal. Several States made proposals to restore the requirement of written withdrawal[347] with a view to bringing the provision "into line with article 18 [23 in the definitive text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing".[348] Although K. Yasseen considered that "an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as

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[344] See the commentary to draft guideline 2.5.8, para. (4).

[345] See the model clauses proposed by the Commission following draft guideline 2.5.8.

[346] *Yearbook ... 1962*, vol. II, p. 75, document A/CN.4/144, p. 69; see the commentary to draft guideline 2.5.1, para. (5).

[347] See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States (A/CONF.39/C.1/L.171), reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968* and *9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), documents of the Committee of the Whole, pp. 152-153 and 287.

[348] Statement by Mrs. Bokor-Szegó (Hungary) in *Official Records* ..., ibid., p. 36, para. 13.

much as possible",[349] the principle was unanimously adopted[350] and it was decided to include this provision not in article 20 itself, but in article 23, which dealt with "Procedure regarding reservations" in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.[351]

(3) Although Yasseen had been right, at the 1969 Conference, to emphasize that the withdrawal procedure "should be facilitated as much as possible",[352] the burden imposed on a State by the requirement of written withdrawal should not be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,[353] it would be incongruous if a reservation, about which there can surely be no doubt that it should be in writing,[354] could be withdrawn simply through an oral statement. It would result in considerable uncertainty for the other Contracting Parties, which would have received the written text of the reservation, but would not necessarily have been made aware of its withdrawal.[355]

(4) The Commission has nevertheless considered whether the withdrawal of a reservation may not be implicit, arising from circumstances other than formal withdrawal.

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[349] Ibid., p. 38, para. 39.

[350] Ibid., para. 41.

[351] Ibid., 29th meeting, 19 May 1969, p. 159, paras. 10-13. See José Maria Ruda, "Reservations to Treaties", *RCADI* 1975-III, vol. 146, p. 194.

[352] Supra, note 349.

[353] See the commentary to draft guideline 2.5.4, para. (6).

[354] See draft guideline 2.1.1.

[355] In this connection, see J.M. Ruda, supra, note 351, pp. 195-196.

(5) Certainly, as J.M. Ruda points out, "the withdrawal of a reservation … is not to be presumed".[356] Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization should not be characterized as the withdrawal of a reservation.

(6) It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.[357] The fact remains that it is a separate instrument and that a State which made a reservation to the first treaty is bound by the second and not the first. If, for example, a third State, by acceding to the second treaty, acceded also to the first, the impact of the reservation would be fully felt in that State's relations with the reserving State.

(7) Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,[358] cannot be interpreted as being a withdrawal of the reservation, which may well have been "formulated" but, for lack of formal confirmation, has not been "made" or

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[356] Ibid., p. 196.

[357] In this connection, see Jean-François Flauss, supra, note 340 at pp. 857-858, but see also F. Tiberghien, *La protection des réfugiés en France,* Économica, Paris, 1984, pp. 34-35 (quoted by Flauss, p. 858).

[358] Cf. the 1969 and 1986 Vienna Conventions, art. 23, para. 2, and draft guideline 2.2.1 and the commentary to it in the report of the Commission on the work of its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 464-472.

"established".[359] The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

(8) The reasoning has been disputed, basically on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the Conventions on the Law of Treaties; and, under article 23, paragraph 3, "an express acceptance or an objection does not need to be renewed if made before confirmation of the reservation".[360] Nevertheless, as the same writer says: "Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view."[361] The effects of non-confirmation and of withdrawal are thus too different for it to be possible to class the two institutions together.

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[359] Non-confirmation is, however, sometimes (wrongly) called "withdrawal"; cf. *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5, vol. I, p. 376, footnote 16), relating to the non-confirmation by the Indonesian Government of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

[360] Pierre-Henri Imbert, supra, note 324 at p. 286.

[361] Ibid., footnote omitted.

(9) It would even seem impossible to consider that an expired reservation has been withdrawn. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations.[362] But expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time, whereas withdrawal is a unilateral juridical act expressing the will of its author.

(10) The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the questionnaire on reservations,[363] Estonia stated that it had limited its reservation to the European Convention on Human Rights to one year, since "one year is considered to be a sufficient period to amend the laws in question".[364] In this case, the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

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[362] See for example, art. 12 of the Council of Europe Convention on the Unification of Certain Points of Substantive Law on Patents for Invention of 1963, which provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles of 1973 allows Belgium to make a reservation for a three-year period starting at the entry into force of the Convention. See also the examples given by Sia Spiliopoulou Åkermark, "Reservation Clauses in Treaties Concluded within the Council of Europe", *ICLQ*, 1999, pp. 499-500, or P.H. Imbert, supra, note 324, p. 287, note 21; also art. 124 of the Rome Statute of the International Criminal Court of 17 July 1998, which sets a seven-year time limit on the possibility of non-acceptance of the Court's competence in respect of war crimes. Other Council of Europe conventions such as the Conventions on the Adoption of Children, of 24 April 1967, and the Legal Status of Children Born out of Wedlock, of 15 October 1975 likewise authorize only temporary, but renewable reservations; as a result of difficulties with the implementation of these provisions (cf. Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, 1999, pp. 101-102), the new reservation clauses in Council of Europe conventions state that failure to renew a reservation would cause it to lapse (see the Criminal Law Convention on Corruption of 1999, art. 38, para. 2).

[363] Replies to questions 1.6 and 1.6.1.

[364] See also the example given by Jörg Polakiewicz, supra, note 362, pp. 102-104. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (cf. the reservation by Malta to arts. 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, *Multilateral Treaties* ..., supra, note 359, p. 234; see also the reservations by Barbados to the International Covenant on Civil and Political Rights, ibid., vol. I, p. 162).

(11) What have been termed "forgotten reservations"[365] must also be mentioned. A reservation is "forgotten", in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. This situation, which is not uncommon,[366] although a full assessment is difficult, and which is probably usually the result of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to legal chaos, particularly in States with a tradition of legal monism.[367] Moreover, since domestic laws are "merely facts" from the standpoint of international law,[368] whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at the international level, will continue, in principle, to be fully effective and the reserving State will continue to avail itself of the reservation with regard to the other parties, although such an attitude could be questionable in terms of the principle of good faith.

(12) According to most members of the Commission, these examples, taken together, show that the withdrawal of a reservation may never be implicit: a withdrawal occurs only if the author of the reservation declares formally and in writing, in accordance with the rule embodied in article 23, paragraph 4, of the Vienna Conventions and reproduced in draft guideline 2.5.2, that he intends to revoke it. While sharing that viewpoint, some members of the Commission

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[365] J.F. Flauss, supra, note 340, p. 861, or F. Horn, supra, note 324, p. 223.

[366] See J.F. Flauss, supra, note 340, p. 861; see pp. 861-862, the examples concerning France given by this author.

[367] In these States, judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter were adopted later. Cf. art. 55 of the French Constitution of 1958 and the many constitutional provisions which either use the same wording or are inspired by it in French-speaking African countries. The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) which prevails, unless the reservation is formally withdrawn. The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent *domestic* law.

[368] Cf. Permanent Court of International Justice, Judgment of 25 May 1926, *Certain German interests in Polish Upper Silesia*, Series A, No. 7, p. 19.

nevertheless considered that the expression by a State or an international organization of its intention to withdraw a reservation entailed immediate legal consequences, mirroring the obligations incumbent upon a State signatory to a treaty under article 18 of the 1969 and 1986 Vienna Conventions.

2.5.3 Periodic review of the usefulness of reservations

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

Commentary

(1) The treaty monitoring bodies, particularly but not exclusively in the field of human rights, are calling increasingly frequently on States to reconsider their reservations and, if possible, to withdraw them. These appeals are often relayed by the general policy-making bodies of international organizations such as the General Assembly of the United Nations and the Committee of Ministers of the Council of Europe.[369] Draft guideline 2.5.3 reflects these concerns.

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[369] For recent examples, see, among others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Human Rights Treaties (para. 7); 54/137 of 17 December 1999 and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 5); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Sub-Commission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), para. 7, dated 1 October 1993.

(2) The Commission is aware that such a provision would have no place in a draft convention, since it could not be of much normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, a "code of recommended practices".[370] It would therefore not be out of place to draw its users' attention to the drawbacks of these "forgotten", obsolete or superfluous reservations[371] and the benefits of reconsidering them periodically with a view to withdrawing them totally or partially.

(3) It goes without saying that it is no more than a recommendation, as emphasized by the use of the conditional tense in draft guideline 2.5.3 and of the word "consider" in the first paragraph and the words "where relevant" in the second, and that the parties to a treaty that have accompanied their consent to be bound by reservations remain absolutely free to withdraw their reservations or not. This is why the Commission has not thought it necessary to determine precisely the frequency with which reservations should be reconsidered.

(4) Similarly, in the second paragraph, the elements to be taken into consideration are cited merely by way of example, as shown by the use of the words "in particular". The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, that may undermine the unity of the treaty regime. The reference to careful consideration of internal law and developments in it since the reservations were formulated may be explained by the fact that the divergence from the treaty provisions of the provisions in force in the State party is often used to justify the formulation of a reservation. Domestic provisions are not immutable, however (and participation in a treaty should in fact be an incentive to modify them), so that it may happen - and often does[372] - that a reservation becomes obsolete because internal law has been brought into line with treaty requirements.

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[370] This expression was used by Sweden in its comments on the Commission's 1962 draft on the law of treaties; see the fourth report of Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 49.

[371] In this connection, see the commentary to draft guideline 2.5.2, paras. (9)-(11).

[372] See ibid., para. (11).

(5) While endorsing draft guideline 2.5.3, some members of the Commission indicated that the words "internal law" were suitable for States, but not for international organizations. In this connection, it may be noted that article 46 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations contains "Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties".[373] The Commission nevertheless considered that the words "rules of an international organization" were not very widely used and were imprecise, owing to the lack of any definition of them. Moreover, the phrase "internal law of an international organization" is commonly used as a way of referring to the "proper law"[374] of international organizations.[375]

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:

(*a*) That person produces appropriate full powers for the purposes of that withdrawal; or

(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

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[373] See the commentary to the corresponding draft article, adopted by the Commission in *Yearbook ... 1982*, vol. II, Part Two, p. 53, para. (2).

[374] See C.W. Jenks, *The Proper Law of International Organizations*, Stevens, London, 1962, p. 282.

[375] See Lazar Focsaneanu, "Le droit interne de l'O.N.U.", *AFDI*, 1957, pp. 315-349; Philippe Cahier, "Le droit interne des organisations internationales", *RGDIP*, 1963, pp. 563-602; G. Balladore-Pallieri, "Le droit interne des organisations internationales", *RCADI*, 1969-II, vol. 127, pp. 1-38; and Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, LGDJ, Paris, 2002, pp. 576-577.

2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(*b*) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(*c*) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty concluded between the accrediting States and that organization.

Commentary

(1) The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,[376] are entirely silent as to the procedure for their withdrawal. The aim of draft guideline 2.5.4 is to repair that omission.

(2) The question has not, however, been completely overlooked by several of the Commission's Special Rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of "formal notice",[377] but did not specify who should notify whom or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

> "... Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty."[378]

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[376] See para. (7) below.

[377] See commentary to draft guideline 2.5.1, para. (2).

[378] *Yearbook ... 1962*, vol. II, p. 61; see also draft guideline 2.5.1, para. (3). The Special Rapporteur on the law of treaties did not accompany this part of his draft with any commentary (ibid., p. 66).

(3) Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it[379] and it was not restored by the Commission. During the brief discussion of the Drafting Committee's draft, however, Waldock pointed out that "[n]otification of the withdrawal of a reservation would normally be made through a depositary".[380] This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that topic[381] and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal "becomes operative when *notice of it has been received by the other States concerned from the depositary*".[382]

(4) During the discussion in the Commission, Waldock explained that the omission of a reference to the depositary on first reading had been due solely to "inadvertence"[383] and his suggestion for remedying it was not disputed in principle. Mr. Rosenne, however, believed that it was "not as clear as it appeared"[384] and suggested the adoption of a single text grouping together all notifications made by the depositary.[385] Although the Drafting Committee did not

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[379] *Yearbook ... 1962*, vol. I, 664th meeting, 19 June 1962, p. 234, para. 67.

[380] Ibid., para. 71.

[381] *Yearbook ... 1965*, vol. II, p. 55.

[382] Ibid., p. 56; italics added. See the commentary to draft guideline 2.5.1, supra, note 306.

[383] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 174, para. 45.

[384] Ibid., p. 176, para. 65.

[385] See ibid., 803rd meeting, 16 June 1965, pp. 197-199, paras. 30-56; for the text of the proposal, see *Yearbook ... 1965*, vol. II, p. 73.

immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,[386] who is also not mentioned in the Commission's final draft[387] or in the text of the Convention itself.[388]

(5) To rectify the omissions in the Vienna Conventions regarding the procedure for the withdrawal of reservations, the Commission might contemplate transposing the rules relating to the formulation of reservations. This is not, however, self-evident.

(6) On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary in 1966 on draft article 51 on the law of treaties relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that "this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the '*acte contraire*'".[389] As Paul Reuter pointed out, however, the Commission "is really taking exception only to the formalist conception of international agreements: it feels that what one conceptual act has established, another can undo, even if the second takes a different form from the first. In fact, the Commission is really accepting a non-formalist conception of the theory of the *acte contraire*".[390] This nuanced position surely can and should be applied to the issue of

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[386] See ibid., 814th meeting, 29 June 1965, p. 272, para. 22, and the comments by Mr. Rosenne and Sir Humphrey, ibid., paras. 26-28.

[387] Art. 20, para. 2; see the text of this provision in the commentary on draft guideline 2.5.1, para. (5).

[388] Cf. arts. 22 and 23 of the 1969 and 1986 Vienna Conventions.

[389] Para. (3) of the commentary to draft article 51, *Yearbook ... 1966*, vol. II, p. 249; see also the commentary to art. 35, ibid., pp. 232-233.

[390] *Introduction au droit des traités*, Presses Universitaires de France, Paris, 3rd ed., ed. Philippe Cahier, p. 141, para. 211 (original italics). See also Sir Ian Sinclair, *The Vienna Conference on the Law of Treaties*, Manchester University Press, 2nd ed., 1984, p. 183. For a flexible position on the denunciation of a treaty, see International Court of Justice (ICJ), decision of 21 June 2000, *Aerial incident of 10 August 1999 (Competence of the Court), I.C.J. Reports*, 2000, p. 25, para. 28.

reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

(7) On the other hand, it has to be said that the Vienna Conventions contain few rules specifically relating to the procedure for formulating reservations, apart from article 23, paragraph 1, which merely states that they must be "communicated to the contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty".[391]

(8) Since there is no treaty provision directly concerning the procedure for withdrawing reservations and in view of the inadequacy even of those relating to the formulation of reservations, the Commission considered draft guidelines 2.1.3 to 2.1.8 [2.1.7 bis] relating to the communication of reservations in the light of the current practice and the (rare) discussions of theory and discussed the possibility and the appropriateness of transposing them to the withdrawal of reservations.

(9) With regard to the formulation of reservations proper, draft guideline 2.1.3[392] is taken directly from article 7 of the Vienna Conventions entitled "Full powers". There seems no reason

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[391] Draft guideline 2.1.5, para. 1, reproduces this provision, while para. 2 details the procedure to be followed when the reservation relates to the constituent instrument of an international organization.

[392] "1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as respecting a State or an international organization for the purpose of formulating a reservation if: (a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or (b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes

why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations[393] apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other Contracting Parties and should therefore be issued by the same individuals or bodies with competence to bind the State or international organization at the international level. This must therefore apply a fortiori to its withdrawal, which puts the seal on the reserving State's commitment.

(10) The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had inquired about the "form in which the notifications of withdrawal" of some reservations made in respect of the Convention on the Political Rights of Women of 31 March 1953 and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 should be made.[394] After noting that the Vienna Convention makes no reference to the subject and recalling the definition of "full powers" given in article 2, paragraph 1 (c),[395] the author of the letter adds:

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without having to produce full powers. 2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs; (b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference; (c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body; (d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization."

[393] See the commentary to draft guideline 2.1.3 in *Report of the International Law Commission on the work of its fifty-fourth session (2002), Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. (8) to (12).

[394] *United Nations Juridical Yearbook 1974*, pp. 190-191.

[395] "[The Vienna Convention] defines 'full powers' as 'a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty'".

> "Clearly the withdrawal of a reservation constitutes an important transaction and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations."

And in conclusion:

> "Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than makes up for the resulting inconvenience."[396]

(11) Firm though this conclusion is, the words "in principle", which appear in italics in the text of the Secretariat's legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges,

> "On several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the

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[396] Original italics. A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: "A reservation must be formulated in writing (art. 23, para. 1, of the [Vienna] Convention), and both reservations *and withdrawals* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (art. 7 of the Convention)" (*United Nations Juridical Yearbook 1976*, p. 211 - italics added).

Permanent Representative, duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so."[397]

(12) This raises a question that the Commission has already considered in relation to the formulation of reservations:[398] would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

(13) After thorough consideration, however, the Commission did not adopt this progressive development, since it was anxious to depart as little as possible from the provisions of article 7 of the Vienna Conventions. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*,[399] so long as it is understood that a "non-formalist conception"[400] of it is advisable. That means, in this case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the

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[397] *United Nations Juridical Yearbook 1974*, pp. 190-191. This is confirmed by the memorandum of 1 July 1976: "On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations", *United Nations Juridical Yearbook 1976*, p. 211, note 121.

[398] See commentary to draft guideline 2.1.3, supra, note 393, paras. (13) to (17).

[399] See para. (6) above.

[400] See Paul Reuter's phrase, ibid.

formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Vienna Conventions.

(14) Moreover, it seems that the United Nations Secretary-General has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the Organization.[401] And, in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Treaty Section of the Office of Legal Affairs states: "Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty."[402] There is no mention of any possible exceptions.

(15) The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies by States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation[403] and withdrawal[404] of reservations by letters from the permanent representatives of the Council.

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[401] Jean-François Flauss mentions, however, a case in which a reservation by France (to art. 7 of the Convention on the Elimination of All Forms of Discrimination against Women, of 1 March 1980) was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations ("Note sur le retrait par la France des réserves aux traités internationaux", *AFDI*, 1986, p. 860).

[402] *Summary of Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs, United Nations, 1997, ST/LEG/7, Sales No. E.94.V.15, p. 64, para. 216.

[403] See the commentary to draft guideline 2.1.3, supra, note 393, para. (14).

[404] Cf. European Committee on Legal Cooperation (CDCJ), *CDCJ Conventions and reservations to those Conventions*, Note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (99) 36, 30 March 1999.

(16) It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called into question by the inclusion of over-rigid rules in the Guide to Practice. That pitfall is avoided in the text adopted for draft guideline 2.5.4 [2.5.5], which transposes to the withdrawal of reservations the wording of guideline 2.1.3 and takes care to maintain the "customary practices in international organizations which are depositaries of treaties".

(17) Even apart from the replacement of the word "formulate" by the word "withdraw", however, the transposition is not entirely word for word:

> Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));
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> For the same reason, paragraph 2 (b) of draft guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

2.5.5 [2.5.5 bis, 2.5.5 ter] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

Commentary

(1) Draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter] is, in relation to the withdrawal of reservations, the equivalent of draft guideline 2.1.4 [2.1.3 bis, 2.1.4] relating to the "Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations".[405]

(2) The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one with competence to decide the issue at the internal level. Here, too, mutatis mutandis,[406] the problem is the same as that relating to the formulation of reservations.[407]

(3) The replies by States and international organizations to the questionnaire on reservations do not give any utilizable information regarding competence to decide on the withdrawal of a reservation at the internal level. Legal theory, however, provides certain indications in that respect.[408] A more exhaustive study would very probably reveal the same diversity in relation to

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[405] "The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation."

[406] A reservation "removed" from the treaty; its withdrawal serves as the culmination of its acceptance.

[407] See the commentary to draft guideline 2.1.4, in *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 75-79.

[408] See, for example, Giorgio Gaja, "Modalità singolari per la revoca di una reserva", *Rivista di diritto internazionale*, 1989, pp. 905-907, or Luigi Migliorino, supra, note 331 at pp. 332-333, in relation to the withdrawal of a reservation by Italy to the 1951 Convention relating to the Status of Refugees or, for France, Jean-François Flauss, supra, note 340 at p. 863.

internal competence to withdraw reservations as has been noted with regard to their formulation.[409] There seems to be no reason, therefore, why the wording of draft guidelines 2.1.4 [2.1.3 bis, 2.1.4] should not be transposed to the withdrawal of reservations.

(4) It would, in particular, seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that a reservation is not valid because it violates the rules of its internal law; this situation could very well arise in practice, although the Commission does not know of any specific example.

(5) As the Commission indicated in relation to the formulation of reservations,[410] there might be a case for applying to reservations the "defective ratification" rule of article 46 of the Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. Whether the formulation of reservations or, still more, their withdrawal is involved, the relevant rules are seldom spelled out in formal texts of a constitutional or even a legislative nature.[411]

(6) The Commission wondered whether it would not be more elegant simply to refer the reader to draft guideline 2.1.4 [2.1.3 bis, 2.1.4] of which draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter] is a word-for-word transposition, with the simple replacement of the words "formulation" and "formulate" by the words "withdrawal" and "withdraw". Contrary to the position with regard to draft guideline 2.5.6, the Commission decided that it would be preferable, in this case, to opt for the reproduction of draft guideline 2.1.4 [2.1.3 bis, 2.1.4]:

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[409] See the commentary to draft guideline 2.1.4, supra, note 407, paras. (3)-(6).

[410] Ibid., para. (10).

[411] These uncertainties also explain the hesitation of the few authors who have tackled the question (see supra, note 408). If a country's own specialists in these matters are in disagreement among themselves or criticize the practices of their own Government, other States or international organizations cannot be expected to delve into the mysteries and subtleties of internal law.

draft guideline 2.5.5 [2.5.5 bis, 2.5.5 ter] is inextricably linked with draft guideline 2.5.4 [2.5.5], for which a simple reference is impossible.[412] It seems preferable to proceed in the same manner in both cases.

2.5.6 Communication of withdrawal of a reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

Commentary

(1) As the Commission noted elsewhere,[413] the Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal, but it does not specify either who should make this notification or the procedure to be followed. Draft guideline 2.5.6. serves to fill that gap.

(2) To that end, the Commission used the same method as for the formulation of the withdrawal *stricto sensu*[414] and considered whether it might not be possible and appropriate to transpose draft guidelines 2.1.5 to 2.1.7 it had adopted on the communication of reservations themselves.

(3) The first remark that must be made is that, although the Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that:

Notification of withdrawal must be made by the depositary, if there is one; and

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[412] See commentary to draft guideline 2.5.4 [2.5.5], para. (17).

[413] See ibid., para. (1).

[414] Ibid, para. (8).

The recipients of the notification must be "every State which is or is entitled to become a party to the treaty" and "interested States".[415]

(4) It is only because, at least partly at the instigation of Mr. Rosenne, it was decided to group together all the rules relating to depositaries and notification, which constitute articles 76 to 78 of the 1969 Vienna Convention,[416] that these proposals were abandoned.[417] They are, however, entirely consistent with draft guidelines 2.1.5 and 2.1.6 [2.1.6, 2.1.8.][418]

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[415] Ibid, paras. (2) and (3).

[416] And arts. 77 to 79 of the 1986 Vienna Convention.

[417] See the commentary to draft guideline 2.5.4 [2.5.5], para. (4).

[418] Draft guideline 2.1.5 ("Communication of reservations"): "A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to the treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

Draft guideline 2.1.6 [2.1.6, 2.1.8] ("Procedure for communication of reservations"): "Unless otherwise provided in the treaty agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted: (i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or (ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

Where a communication relating to a reservation to a treaty is made by electronic mail, or by facsimile, it must be confirmed by diplomatic note or depositary notification."

(5) This approach is endorsed by the legal theory on the topic,[419] meagre though it is, and is also in line with current practice. Thus,

- Both the Secretary-General of the United Nations[420] and the Secretary-General of the Council of Europe[421] observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries and they communicate them to all the Contracting Parties and the States and international organizations entitled to become parties;

- Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation of reservations, in line with the rules given in draft guidelines 2.1.5 and 2.1.6 [2.1.6, 2.1.8], in that they specify that the depositary must be notified of a withdrawal[422] and even that he should communicate it to the Contracting Parties[423] or, more broadly, to "every State" entitled to become party or to "every State", without specifying further.[424]

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[419] See Luigi Migliorino, supra, note 331 at p. 323, or Adolfo Maresca, *Il Diritto dei trattati*, Giuffrè, Milan, 1971, p. 302.

[420] See *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vols. I and II, *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations of 18 April 1961 by China, Egypt and Mongolia, vol. I, p. 111, notes 13 and 15 and p. 112, note 17; or to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 by Colombia, Jamaica and the Philippines, ibid., pp. 409 and 410, notes 8, 9 and 11).

[421] See European Committee on Legal Cooperation (CDCJ), *Conventions and Reservations to those Conventions*, note by the Secretariat drafted by the Directorate-General of Legal Affairs, CDCJ (1999) (see the withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in cases of Multiple Nationality of 1963, pp. 11 and 12).

(6) As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to him for the formulation of reservations in draft guidelines 2.1.6 [2.1.6, 2.1.8] and 2.1.7,[425] which are a combination of article 77, paragraph 1,

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[422] See, for example, the Convention on the Contract for the International Carriage of Goods by Road, of 19 May 1956, art. 48, para. 2; the Convention on the Limitation Period in the International Sale of Goods, as amended, of 1 August 1988, art. 40, para. 2; the Convention on the fight against corruption involving officials of the European Communities or officials of member States of the European Union, art. 15, para. 2; or the Council of Europe Convention on Cybercrime, art. 43, para. 1.

[423] See, for example, the European Agreement on Road Markings of 13 December 1957, arts. 15, para. 2, and 17 (b), or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, of 26 October 1961, arts. 18 and 34 (c).

[424] See, for example, the Convention on Psychotropic Substances of 21 February 1971, arts. 25, para. 5, and 33, the Customs Convention on Containers of 2 December 1972, arts. 26, para. 3, and 27, the International Convention on the Harmonization of Frontier Control of Goods of 21 October 1982, arts. 21 and 25, or the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (notification to be made "to Member States of the Hague Conference on Private International Law").

[425] See the text of draft guideline 2.1.6 [2.1.6, 2.1.8] supra, note 418. Draft guideline 2.1.7 ("Functions of depositories"):

> "The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.
>
> In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of (a) the signatory States and organizations and the contracting States and contracting organizations; or (b) Where appropriate, the competent organ of the international organization concerned."

and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention[426] and are in conformity with the principles on which the relevant Vienna rules are based:[427]

- Under article 78, paragraph 1 (e), the depositary is given the function of "informing the Parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty"; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in draft guideline 2.1.6 [2.1,6, 2,1.8] (ii);

- The first paragraph of draft guideline 2.1.7 is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether "notification or communication relating to the treaty is in due and proper form and, if need be, [bring] the matter to the attention of the State or international organization in question"; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);[428]

- The second paragraph of the same draft guideline carries through the logic of the "letter-box depositary" theory endorsed by the Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

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[426] These correspond to arts. 77 and 78 of the 1969 Convention.

[427] See the commentary to draft guidelines 2.1.6 [2.1.6, 2.1.8] and 2.1.7, in Report of the International Law Commission, fifty-fourth session (2002), *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 102-123.

[428] See the commentary to draft guideline 2.5.4 [2.5.5], paras. (10) and (11).

(7) Since the rules contained in draft guidelines 2.1.5 to 2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to the formulation of reservations, the Commission preferred to reproduce and adapt draft guidelines 2.1.3 and 2.1.4 [2.1.3 bis, 2.1.4] in draft guidelines 2.5.4 [2.5.5] and 2.5.5 [2.5.5 bis, 2.5.5 ter]. That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible.[429] The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of draft guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7 fits perfectly, with the simple replacement of the word "formulation" by the word "withdrawal". The use of a reference has fewer disadvantages and, although several members did not agree, the Commission considered that it was enough merely to refer to those provisions.

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

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[429] See the commentary to draft guideline 2.5.4 [2.5.5], para. (17), and the commentary to draft guideline 2.5.5 [2.5.5 bis, 2.5.5.ter] para. (6).

Commentary

(1) In the abstract, it is not very logical to insert draft guidelines relating to the effect of the withdrawal of a reservation in a chapter of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Special Rapporteur has decided to do so, for two reasons:

- In the first place, article 22 of the Vienna Conventions links the rules governing the form and procedure[430] of a withdrawal closely with the question of its effect; and
- In the second place, the effect of a withdrawal may be viewed as being autonomous, thus precluding the need to go into the infinitely more complex effect of the reservation itself.

(2) Article 22, paragraph 3 (a), of the Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal "becomes operative". During the *travaux préparatoires* of the 1969 Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(3) In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related and is equally entitled to claim compliance with that provision by the other parties.[431] Draft article 22,

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[430] Admittedly, only to the extent that para. 3 (a) refers to the "notice" of a withdrawal.

[431] *Yearbook ... 1956*, vol. II, p. 118, document A/CN.4/101, art. 40, para. 3.

paragraph 2, adopted by the Commission on first reading in 1962, provided that "upon withdrawal of a reservation, the provisions of article 21 [relating to the application of reservations] cease to apply";[432] this sentence disappeared from the Commission's final draft.[433] In plenary, Sir Humphrey Waldock suggested that the Drafting Committee could discuss a further question, namely, "the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force";[434] and, during the Vienna Conference, several amendments were made aiming to re-establish a provision to that effect in the text of the Convention.[435]

(4) The Conference Drafting Committee rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.[436] This is only partially true.

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[432] *Yearbook ... 1962*, vol. II, p. 181.

[433] It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (cf. commentary to draft guideline 2.5.8), without offering any comment (cf. *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 272, para. 22).

[434] Ibid., 800th meeting, 14 June 1965, p. 178, para. 86; in that context, see S. Rosenne, ibid., para. 87.

[435] Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1; see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Conference Documents* (United Nations publication, Sales No. E.70.V.5), Committee of the Whole, documents with a sub-amendment by the USSR (A/CONF.39/C.1/L.167, ibid.).

[436] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 70th meeting (14 May 1968), statement by K. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

(5) There can be no doubt that "the effect of withdrawal of a reservation is obviously to restore the original text of the treaty".[437] A distinction should, however, be made between three possible situations.

(6) In the relations between the reserving and the accepting State (or international organization) (art. 20, para. 4, of the Vienna Conventions), the reservation ceases to be operational (art. 21, para. 1): "In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made."[438] Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of the International Court of Justice;[439] there had been no objection to this reservation and, as a result of the withdrawal, the Court's competence to interpret and apply the Convention was established from the effective date of the withdrawal.[440]

(7) The same applies to the relations between the State (or international organization) which withdraws a reservation and a State (or international organization) which has objected to, but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 21, paragraph 3, of the Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: "In a situation of this kind, the

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[437] Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Year Book of International Law, 1976-1977*, p. 87. See also R. Szafarz, supra, note 399 at p. 313.

[438] ("Intervendendo in una situazione di questo tipo, la revoca della riserva avrà l'effeto di ristablire il contenuto originario del trattato nei rapporti tra lo Stato riservante e lo Stato che ha acettato la riserva. La revoca della reserva crea quella situazione giuridica che sarebbe esistita se la reserva non fosse stata appostata.") Luigi Migliorino, supra, note 331 at p. 325; in that connection, see R. Szafarz, supra, note 339 at p. 314.

[439] *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vol. I, p. 382, footnote 16.

[440] L. Migliorino, supra, note 331, pp. 325-326.

withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation."[441]

(8) The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In that situation, the treaty enters into force[442] on the date on which the withdrawal takes effect. "For a State ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving State."[443]

(9) In other words, the withdrawal of a reservation entails the application of the treaty in its entirety (so long as there are no other reservations, of course) in the relations between the State or international organization which withdraws the reservation and all the other Contracting Parties, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization, the treaty enters into force from the effective date of the withdrawal.

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[441] Ibid., pp. 326-327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations of 1961, art. 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between them and Portugal (see *Multilateral Treaties* ..., supra, note 439, p. 112, footnote 18).

[442] See art. 24 of the Vienna Conventions, especially para. 3.

[443] R. Szafarz, supra, note 339, pp. 315 and 316; in that connection, see José Maria Ruda, "Reservations to Treaties", *RCADI*, 1975-III, vol. 146, p. 202; D. Bowett, supra, note 437, p. 87, and L. Migliorino, supra, note 331, pp. 328-329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to the 1969 Vienna Convention, art. 66 (see *Multilateral Treaties* ..., supra, note 439, vol. II, p. 273, footnote 13); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

(10) In the latter case, treaty relations between the reserving State or international organization and the objecting State or international organization are established even where other reservations remain, since the opposition of the State or international organization to the entry into force of the treaty was due to the objection to the withdrawn reservation. The other reservations become operational, in accordance with the provisions of article 21 of the Vienna Conventions, as from the entry into force of the treaty in the relations between the two parties.

(11) It should also be noted that the wording of the first paragraph of the draft guideline follows that of the Vienna Conventions, in particular, article 2, paragraph 1 (d), and article 23, which assume that a reservation refers to treaty provisions (in the plural). It goes without saying that the reservation can be made to only one provision or, in the case of an "across-the-board" reservation, to "the treaty as a whole with respect to certain specific aspects".[444] The first paragraph of draft guideline 2.5.7 [2.5.9, 2.5.8] covers both of these cases.

2.5.8 [2.5.9] Effective date of withdrawal of a reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Commentary

(1) Draft guideline 2.5.8 [2.5.4] reproduces the text of the "chapeau" and of article 22, paragraph 3 (a), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

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[444] Cf. draft guideline 1.1.1.

(2) This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Convention[445] or at the Vienna Conference of 1968-1969, which did no more than clarify[446] the text adopted on second reading by the Commission.[447] Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

(3) Whereas Sir Gerald Fitzmaurice had, in his first report, in 1956, planned to spell out the effects of the withdrawal of a reservation,[448] Sir Humphrey Waldock expressed no such intention in his first report, in 1962.[449] It was, however, during the Commission's discussions in that year

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[445] See Paul Reuter, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1975*, vol. II, p. 38, and fifth report, *Yearbook ... 1976*, vol. II (Part One), p. 146; for the (lack of) discussion by the Commission: *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 100, paras. 30-35 and 1435th meeting, 7 June 1977, p. 103, paras. 1 and 2; also 1451st meeting, 1 July 1977, p. 194, paras. 12-16, and the Commission's report of the same year, ibid., vol. II (Part Two), pp. 114-116; and, for the second reading, see the tenth report of Paul Reuter, *Yearbook ... 1981*, vol. II (Part One), p. 63, para. 84; the (lack of) discussion at the 1652nd meeting, 15 May 1981, and 1692nd meeting, 16 July 1981, *Yearbook ... 1981*, vol. I, p. 54, paras. 27-28 and p. 265, para. 38, and the final text, ibid., vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36-37.

[446] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 142, para. 211 (text of the Drafting Committee).

[447] The plural ("... when notice of it has been received by the other contracting States": see *Yearbook ... 1966*, vol. II, p. 209, document A/6309/Rev.1) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (cf. the exposition by Yasseen, Chairman of the Conference Drafting Committee, in *Official Records* ..., supra, note 446, 11th plenary meeting, p. 39, para. 11). On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, p. 285, and *Yearbook ... 1966*, vol. I, p. 327.

[448] See the commentary to draft guideline 2.5.1, para. (2).

[449] Ibid., para. (3).

that, for the first time, a provision was included, at the request of Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal "takes effect when notice of it has been received by the other States concerned".[450]

(4) Following the adoption of this provision on first reading, three States reacted:[451] the United States of America, which welcomed it; and Israel and the United Kingdom of Great Britain and Northern Ireland, which were concerned about the difficulties that might be encountered by other States parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a paragraph (c) involving a complicated formula whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.[452] In this way, Sir Humphrey intended to give the other parties the opportunity to take the "requisite legislative or administrative action …, where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.[453]

(5) As well as criticizing the overcomplicated formulation of the solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Ruda, supported by Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case of the entry into force of a treaty as a result of the consent given by a State to be bound.[454] Other members,

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[450] Ibid., para. (5).

[451] See the fourth report by Sir Humphrey Waldock, *Yearbook … 1965*, vol. II, pp. 55-56, document A/CN.4/177 and Add.1 and 2.

[452] "(c) On the date when the withdrawal becomes operative, article 21 ceases to apply, provided that, during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

[453] *Yearbook … 1965*, vol. I, 800th meeting, 11 June 1965, p. 175, para. 47.

[454] Ibid., p. 176, para. 59 (Ruda), and p. 177, para. 76 (Briggs).

however, including Tunkin and Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other State concerned, but on the will of the reserving State which decided" to withdraw it.[455]

(6) The Commission considered, however, that "such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".[456] The Commission nevertheless showed some hesitation in once again stipulating that the date on which the withdrawal became operative was that on which the other Contracting Parties had been notified, because, in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation [resulting from the withdrawal of the reservation] would be going too far", the Commission "felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned".[457]

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[455] Ibid., p. 176, paras. 68 and 69 (Tunkin); see also p. 175, para. 54 (Tsuruoka), and p. 177, paras. 78-80 (Waldock).

[456] Explanations given by Waldock, ibid., eight hundred and fourteenth session, 29 June 1965, p. 273, para. 24.

[457] *Yearbook ... 1966,* vol. II, p. 209, para. (2) of the commentary to draft article 20, document (A/6309/Rev.1, para. 2).

(7) This raises another problem: by proceeding in this manner, the Commission surreptitiously reintroduced in the commentary the exception that Waldock had tried to incorporate in the text itself of what became article 22 of the Convention. Not only was such a manner of proceeding questionable, but the reference to the principle of good faith did not provide any clear guidance.[458]

(8) In the Commission's view the question is nevertheless whether the Guide to Practice should include the clarification contained in the commentary of 1965: it makes sense to be more specific in this code of recommended practices than in general conventions on the law of treaties. In this case, however, there are some serious objections to such inclusion: the "rule" set out in the commentary manifestly contradicts that appearing in the Convention and its inclusion in the Guide would therefore depart from that rule. That would be acceptable only if it was felt to meet a clear need, but this is not the case here. In 1965, Sir Humphrey Waldock had "heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation";[459] this would still seem to be the case 38 years later. It does not therefore appear necessary or advisable to contradict or relax the rule stated in article 22, paragraph 3, of the Vienna Conventions.

(9) It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might give rise to difficulty. The 1965 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be

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[458] As the [International] Court [of Justice] has observed, the "principle of good faith is one of the basic principles governing the creation and performance of legal obligations", *Nuclear Tests, I.C.J. Reports*, 1974, p. 268, para. 46; p. 473, para. 49; "it is not in itself a source of obligation where none would otherwise exist", *Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgment, I.C.J. Reports*, 1988, p. 105, para. 94.

[459] *Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 273, para. 24.

regulated by a specific provision of the treaty".[460] In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

(10) This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than that given, in accordance with general law, in article 22, paragraph 3 (a), of the Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.[461] Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, of 5 May 1989, article 32, paragraph 3,

> Any contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect *on the date of receipt of such notification by the Secretary-General.*

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[460] See para. (6) above.

[461] See the examples, given by Pierre-Henri Imbert, supra, note 324 at p. 390, or Frank Horn, supra, note 324 at p. 438. See also, for example, the United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980, art. 94, para. 4 (six months), the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), of 23 June 1979, art. XIV, para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary), or the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, adopted 1 August 1989 by the Hague Conference on Private International Law, art. 24, para. 3 (three months after notification of the withdrawal).

and not on the date of receipt by the other Contracting Parties of the notification by the depositary.[462] And sometimes a treaty provides that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.[463]

(11) The purpose of these express clauses is to overcome the disadvantages of the principle established in article 22, paragraph 3 (a), of the Vienna Conventions, which is not above criticism. Apart from the problems considered above[464] arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph does not "really resolve the question of the time factor" (ne résout pas vraiment la question du facteur temps),[465] although, thanks to the specific provision introduced at the Vienna Conference in 1969,[466] the partners of a State or international organization which withdraws a reservation know exactly on what date the withdrawal has taken effect in their respect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate effect of leaving the author of the withdrawal uncertain as to the date on which its

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[462] Italics added. Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: cf. the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, art. 8, para. 2; the 1977 European Agreement on the Transmission of Applications for Legal Aid, art. 13, para. 2; or the 1997 European Convention on Nationality, art. 29, para. 3.

[463] Cf. the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention (Revised)) of 18 May 1973, art. 12, para. 2: "... Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect."

[464] Paras. (4) to (9).

[465] P.H. Imbert, supra, note 324, p. 290.

[466] See supra, note 447.

new obligations will become operational.[467] Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice[468] to justify "revising" the Vienna text.

(12) It should, however, be noted in this connection that the Vienna text departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16 (b), 24, paragraph 3, and 78 (b)[469] of the 1969 Convention provide. And that is how the International Court of Justice ruled concerning optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.[470] The exception established by the provisions of article 22, paragraph 3 (a), of the Vienna Conventions is explained by the concern to avoid a situation in which the other Contracting Parties to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.[471] This concern must be commended.

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[467] In this connection, see the comments by Briggs, *Yearbook ... 1965*, vol. I, 800th meeting, 14 June 1965, p. 177, para. 75, and 814th meeting, 29 June 1965, p. 273, para. 25.

[468] See para. (8) above.

[469] Art. 79 (b) of the 1986 Convention.

[470] "By the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from article 36. (...) For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned." Judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections)*, *I.C.J. Reports*, 1957, p. 146; see also *I.C.J. Reports*, 1998, p. 291, para. 25; see ICJ Judgment of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, *I.C.J. Reports*, 1988, p. 293, para. 30.

[471] See the Commission's commentary to draft article 22, adopted on first reading, *Yearbook ... 1962*, vol. II, pp. 181-182, and to draft article 22, adopted on second reading, *Yearbook ... 1966*, vol. II, p. 209.

(13) The Commission has sometimes criticized the inclusion of the phrase "unless the treaty otherwise provides"[472] in some provisions of the Vienna Conventions. In some circumstances, however, it is valuable in that it draws attention to the advisability of possibly incorporating specific reservation clauses in the actual treaty in order to obviate the disadvantages connected with the application of the general rule or the ambiguity resulting from silence.[473] That is certainly the case with regard to the time at which the withdrawal of a reservation became operative, which it is certainly preferable to specify whenever the application of the principle set forth in article 22, paragraph 3 (a), of the Vienna Conventions and also contained in draft guideline 2.5.8 [2.5.9] might give rise to difficulties, either because the relative suddenness with which the withdrawal takes effect might put the other parties in an awkward position or, on the contrary, because there is a desire to neutralize the length of time elapsing before notification of withdrawal is received by them.

(14) In order to assist the negotiators of treaties where this kind of problem arises, the Commission has decided to include in the Guide to Practice model clauses on which they could base themselves, if necessary. The scope of these model clauses and the "instructions for use" are clarified in an "Explanatory note" at the beginning of the Guide to Practice.

> ***Model clause A*** *- Deferment of the effective date of the withdrawal of a reservation*
>
> *A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. This withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary].*

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[472] See, for example, the commentary to draft guideline 2.5.1, para. (15).

[473] See, for example, draft guidelines 2.3.1 and 2.3.2.

Commentary

(a) The purpose of model clause A is to extend the period of time required for the effective date of the withdrawal of a reservation and is recommended especially in cases when the other Contracting Parties might have to bring their own internal law into line with the new situation created by the withdrawal.[474]

(b) Although negotiators are obviously free to modify as they wish the length of time needed for the withdrawal of the reservation to take effect, it would seem desirable that, in the model clause proposed by the Commission, the period should be calculated as dating from receipt of notification of the withdrawal by the depositary rather than by the other Contracting Parties, as article 22, paragraph 3 (a), of the Vienna Conventions provides. In the first place, the effective date established in that paragraph, which should certainly be retained in draft guideline 2.5.8 [2.5.9], is deficient in several respects.[475] In the second place, in cases such as this, the parties are in possession of all the information indicating the probable time scale of communication of the withdrawal to the other States or international organizations concerned; they can thus set the effective date accordingly.

Model clause B *- Earlier effective date of withdrawal of a reservation*

> *A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of the receipt of such notification by [the depositary].*

Commentary

(a) Model clause B is designed to cover the opposite situation to the one dealt with in model A, since situations may arise in which the parties agree that they prefer a shorter time scale than that resulting from the application of the principle embodied in article 22, paragraph 3 (a), of the Vienna Conventions and also contained in draft guideline 2.5.8 [2.5.9]. They may wish to avoid the slowness and uncertainty linked to the requirement that the other Contracting Parties must have received notification of withdrawal. This is especially when there would be no need to modify internal law as a consequence of the withdrawal of reservation by another State or organization.

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[474] See para. (4) of the commentary to draft guideline 2.5.8.

[475] See the commentary to draft guideline 2.5.8 [2.5.9].

(b) There is no reason against this, so long as the treaty in question contains a provision derogating from the general principle contained in article 22, paragraph 3 (a), of the Vienna Conventions and shortening the period required for the withdrawal to take effect. The inclusion in the treaty of a provision reproducing the text of model clause B, whose wording is taken from article 32, paragraph 3, of the 1989 European Convention on Transfrontier Television,[476] would achieve that objective.

Model clause C *- Freedom to set the effective date of withdrawal of a reservation*

> *A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].*

Commentary

(a) The Contracting Parties may also wish to leave it to the discretion of the reserving State or international organization to determine the date on which the withdrawal would take effect. Model clause C, whose wording follows that of article 12, paragraph 2, of the 1973 Kyoto Convention (Revised),[477] applies to this situation.

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[476] See the complete text in para. (10) of the commentary to draft guideline 2.5.8.

[477] See the text of the commentary to draft guideline 2.5.8, supra, note 463.

(b) The insertion of such a clause in a treaty is pointless in the cases covered by draft guideline 2.5.9 and is of no real significance unless the intention is to permit the author of the reservation to give immediate effect to the withdrawal of the reservation or, in any event, to ensure that it becomes operative more rapidly than is provided for in article 22, paragraph 3 (a), of the Vienna Conventions. The purposes of model clause C are therefore similar to those of model clause B.

2.5.9 [2.5.10] Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation

The withdrawal of a reservation takes effect on the date set by the withdrawing State where:

(*a*) That date is later than the date on which the other contracting States or international organizations received notification of it; or

(*b*) The withdrawal does not add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations.

Commentary

(1) Draft guideline 2.5.9 [2.5.10] specifies the cases in which article 22, paragraph 3 (a), of the Vienna Conventions does not apply, not because there is an exemption to it, but because it is not designed for that purpose. Regardless of the situations in which an express clause of the treaty rules out the application of the principle embodied in this provision, this applies in the two above-mentioned cases, where the author of the reservation can unilaterally set the effective date of its withdrawal.

(2) The first subparagraph of draft guideline 2.5.9 [2.5.10] considers the possibility of a reserving State or international organization setting that date at a time later than that resulting from the application of article 22, paragraph 3 (a). This does not raise any particular difficulties: the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State

(or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the reserving party should not set the effective date of the withdrawal of its reservation as it wishes, since, in any case, it could have deferred the date by notifying the depositary of the withdrawal at a later time.

(3) Paragraph (a) of draft guideline 2.5.9 [2.5.10] deliberately uses the plural ("the other contracting States or international organizations") where article 22, paragraph 3 (a), uses the singular ("that State or that organization"). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that *all* the other Contracting Parties should have received notification, otherwise neither the spirit nor the raison d'être of article 22, paragraph 3 (a), would have been respected.

(4) Subparagraph (b) concerns cases in which the date set by the author of the reservation is prior to the receipt of notification by the other Contracting Parties. In that situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This applies all the more where the withdrawal is assumed to be retroactive, as sometimes occurs.[478]

(5) In the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), if the other Contracting Parties object. The Commission believes, however, that it is not worth making an exception of the category of treaties establishing "integral obligations", especially in the field of human rights; in such a situation, there can be no objection - quite the contrary - to the fact that the withdrawal takes immediate, even retroactive effect, if the State making the

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[478] See the example given by P.H. Imbert, supra, note 324 at p. 291 (withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954: see *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vol. I, pp. 314 and 319-320).

original reservation so wishes, since the legislation of other States is, by definition, not affected.[479] In practice, this is the kind of situation in which retroactive withdrawals have occurred.[480]

(6) The Commission debated whether it was preferable to view the question from the angle of the withdrawing State or that of the other parties, in which case subparagraph (b) would have been worded "… the withdrawal does not add to the obligations of the other contracting States or international organizations". After lengthy discussion, the Commission agreed that there were two sides of the same coin and opted for the first solution, which seemed to be more consistent with the active role of the State that decides to withdraw its reservation.

(7) In the English text, the term "auteur du retrait" is translated by "withdrawing State or international organization". It goes without saying that this refers not to a State or an international organization which withdraws from a treaty, but to one which withdraws its reservation.

2.5.10 [2.5.11] Partial withdrawal of a reservation

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

Commentary

(1) In accordance with the prevailing doctrine, "[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect".[481] While this principle is formulated in prudent terms, it is hardly

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[479] In this connection, see P.H. Imbert, supra, note 324 at pp. 290-291.

[480] See supra, note 478.

[481] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge U.P., 2000, p. 128. See also Pierre-Henri Imbert, supra, note 324, at p. 293, or Jörg Polakiewicz, supra, note 362, at p. 96.

questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal. This is the point of departure of draft guideline 2.5.10.

(2) Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect. Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976 provides that:

> The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations.

(3) In addition, reservation clauses expressly contemplating the total *or partial* withdrawal of reservations are to be found more frequently. For example, article 8, paragraph 3, of the Convention on the Nationality of Married Women, of 20 February 1957, provides that:

> Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.[482]

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[482] See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs of 1961, as amended in 1975: "A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations."

The same applies to article 17, paragraph 2, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law, of 4 November 1998, which reads as follows:

> Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General.[483]

In addition, under article 15, paragraph 2, of the Convention on the fight against corruption involving officials of the European Communities or officials of States members of the European Union, of 26 May 1997:

> "Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification."

(4) The fact that partial or total withdrawal are mentioned simultaneously in numerous treaty clauses highlights the close relationship between them. This relationship, confirmed in practice, is, however, sometimes contested in the literature.

(5) During the preparation of the draft articles on the law of treaties by the International Law Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.[484] Following the consideration of this

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[483] See also, for example, article 13, paragraph 2, of the European Convention on the Suppression of Terrorism of 27 January 1977: "Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe which shall become effective as from the date of its receipt." For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see the commentary to draft guideline 2.5.2, supra, note 362.

[484] Cf. draft article 17, para. 6, in Sir Humphrey's first report, *Yearbook ... 1962*, vol. II, p. 69, para. 69.

draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation "in part",[485] although no reason for this modification can be inferred from the summaries of the discussions. The most plausible explanation is that this seemed to be self-evident - "he who can do more can do less" - and the word "withdrawal" should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning "total or partial withdrawal".

(6) The fact remains that this is not entirely self-evident and that practice and the literature[486] appear to be somewhat undecided. In practice, one can cite a number of reservations to Conventions concluded within the framework of the Council of Europe which were modified without arousing opposition.[487] For its part, the European Commission of Human Rights "showed a certain flexibility" as to the time requirement set out in article 64 of the European Convention on Human Rights:[488]

> As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64, ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria

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[485] Ibid., p. 201; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see the commentary to draft guideline 2.5.1, para. (3).

[486] Cf. P.H. Imbert, supra, note 324, at p. 293.

[487] Jörg Polakiewicz, supra, note 362 at p. 95; admittedly, it seems to be more a matter of "statements concerning modalities of implementation of a treaty at the internal level" within the meaning of draft guideline 1.4.5 (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 284-289) than of reservations as such.

[488] Article 57 since the entry into force of Protocol II: "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article. 2. Any reservation made under this Article shall contain a brief statement of the law concerned."

> on 3 September 1958 (1958-1959) (2 *Annuaire* 88-91) covers ... the law of 5 July 1962, which did not have the result of enlarging, a posteriori, the area removed from the control of the Commission.[489]

(7) This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *does not enlarge* the scope of the reservation that the Commission considered that it was covered by the law.[490] Technically, what is at issue is not a modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other Contracting Parties.[491]

(8) The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Strasbourg Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law "goes no farther than a law in force on the date of the said reservation".[492] The outcome of the *Belilos* case is, however, likely to raise doubts in this regard.

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[489] William A. Schabas, commentary on article 64 in L.E. Pettiti, E. Decaux and P.H. Imbert, *La Convention européenne des droits de l'homme - commentaire article par article*, Economica, Paris, 1995, p. 932; italics in text; footnotes omitted. See the reports of the Commission in the cases of *Association X c. Autriche* (req. No. 473/59), *Ann.* 2, p. 405, or *X c. Autriche* (req. No. 88180/78), *DR* 20, pp. 23-25.

[490] Cf. the partially dissenting opinion of Judge Valticos in the *Chorherr c. Autriche* case: "If the law is modified, the divergence to which the reservation refers could probably, if we are not strict, be maintained in the new text, but it could not, of course, be strengthened" (judgement of 25 August 1993, series A, No. 266-B, p. 40).

[491] Cf. the successive partial withdrawals by Finland of its reservation to article 5 in 1996, 1998, 1999 and 2001 (http://conventions.coe.int/treaty/en/cadreprincipal.htm).

[492] Judgement of 25 February 1982, *Campbell et Cosans*, series A, vol. 48, p. 17, para. 37.

(9) Following the position taken by the Strasbourg Court concerning the follow-up to its finding that the Swiss "declaration" made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,[493] Switzerland not without hesitation,[494] first modified its "declaration" - equated by the Court with a reservation, at least insofar as the applicable rules are concerned - so as to render it compatible with the judgment of 29 April 1988.[495] The "interpretative declaration" thus modified was notified by Switzerland to the Secretary-General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers "acting as a monitoring body for the enforcement of judgements of the Court".[496] These notifications do not seem to have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.[497] However, the situation in the Swiss

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[493] The Court held that "the contentious declaration does not meet two requirements of article 64 of the Convention (see supra, note 488), so that it must be deemed invalid" (series A, vol. 132, para. 60) and that, since "there is no doubt that Switzerland considers itself bound by the Convention, independently of the validity of the declaration". The Convention should be applied to Switzerland irrespective of the declaration (ibid.).

[494] Iain Cameron and Frank Horn "*Reservations to the European Convention on Human Rights: The Belilos Case*", *G.Y.B.I.L.*, 1990, pp. 69-129.

[495] Believing that the Court's rebuke dealt only with the "penal aspect", Switzerland had limited its "declaration" to civil proceedings.

[496] J.-F. Flauss, "le contentieux de la validité des réserve à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6 § 1 ", *R.U.D.H.* 1993, p. 301; see also William Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", *Ann. canadien de droit international* 1985, p. 48. For references to these notifications, see Council of Europe, *Série des traités européennes* (STE), No. 5, pp. 16-17, and Committee Resolution DH (89) 24 (Annexe), dated 19 September 1989.

[497] Some authors have, however, contested their validity; see Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme", *RGDIP* 1989, p. 314, and the works cited in the judgment quoted infra, note 499 of the Swiss Federal Court, of 17 December 1992 (para. 6.b), and by J.-F. Flauss, supra, note 496 at p. 300.

courts was different. In a decision dated 17 December 1992, *Elisabeth B. v. Council of State of Thurgau Canton*, the Swiss Federal Court decided, with regard to the grounds for the *Belilos* decision, that it was the entire "interpretative declaration" of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the Rome Convention[498] and in article 19 of the 1969 Vienna Convention.[499] On 29 August 2000, Switzerland officially withdrew its "interpretative declaration" concerning article 6 of the European Convention on Human Rights.[500]

(10) Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

> The Swiss Federal Court's position is based on the idea that, in this case, the 1974 "declaration" was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights); and, above all:
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> In that same decision, the Court stated that:
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> "While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it

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[498] See supra, note 488.

[499] Extensive portions of the Federal Court's decision are cited in French translation in the *Journal des Tribunaux*, vol. I: *Droit fédéral,* 1995, p. 537. The relevant passages are to be found in paragraph 7 of the decision (pp. 533-537).

[500] Cf. http://conventions.coe.int/treaty/en/cadreprincipal.htm.

would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant State's commitment vis-à-vis other States; rather, it increases it in accordance with the Convention."[501]

(11) This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty's integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.[502] Furthermore, as has been pointed out, without this option, the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): "States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, a fortiori, with future Contracting Parties"[503] that would have the advantage of knowing the treaty body's position regarding the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

(12) Moreover, it was such considerations[504] which led the Commission to state in its preliminary conclusions of 1997 that, in taking action on the inadmissibility of a reservation, the State may, for example, modify its reservation so as to eliminate the inadmissibility;[505] obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

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[501] See the decision mentioned in supra, note 499, p. 535.

[502] See Frank Horn, supra, note 324 at p. 223.

[503] Flauss, supra, note 496, p. 299.

[504] See *Yearbook ... 1997*, vol. II, Part Two, paras. 55-56; document A/52/10, paras. 86 and 141-144.

[505] See the preliminary conclusions, *Yearbook ... 1997*, vol. II, Part Two, para. 10.

(13) In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Frank Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations is the depositary, "47 have been withdrawn completely or partly ...[506] In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, six have experienced successive withdrawals leading in only two cases to a complete withdrawal".[507] This trend, while not precipitous, has continued in recent years as demonstrated by the following examples:

- On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance of 20 June 1956;[508]

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[506] Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (cf. art. 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties); however, as the Commission has decided (cf. *Yearbook ... 1995*, vol. II, Part Two, para. 477 and *Yearbook ... 1997*, vol. II, Part Two, para. 221) all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice.

[507] Supra, note 324 at p. 226. These figures are an interesting indication, but should be viewed with caution.

[508] *Multilateral Treaties deposited with the Secretary-General*, Status as at 31 December 2000, vol. II, chap. XX.1, footnote 9; see also Sweden's 1996 "reformulation" of one of its reservations to the 1951 Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (ibid., vol. I, footnote 23) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a Swiss reservation to that Convention.

- On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961;[509] and
- On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, making it more specific.[510]

In all these cases, which provide only a few examples, the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

(14) The Secretary-General's practice is not absolutely consistent, however, and, in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations[511] and confines himself, "in keeping with the ... practice followed in similar cases", to receiving "the declarations in question for deposit in the absence of any objection on the part of any of the contracting States, either to the deposit itself or to the procedure envisaged".[512] This practice is defended in the

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[509] Ibid., vol. II, chap. XIV.3, footnote 7; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (ibid., footnote 5).

[510] Ibid., vol. I, chap. IV.8, footnote 24.

[511] See the commentary to draft guideline 2.3.1, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 482-484, paras. (10) to (12).

[512] Cf., for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties* ..., vol. I, chap. IV.12, footnote 6).

following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "when States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations - which raised no difficulty - and the making of (new) reservations".[513] This position seems to be confirmed by a memorandum dated 4 April 2000 from the United Nations Legal Counsel, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so" and extends the length of time during which parties may object from 90 days to 12 months.[514]

(15) Not only is this position contrary to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note verbale of 4 April 2000 must be read together with the Legal Counsel's reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between "a modification of an existing reservation" and "a partial withdrawal thereof". In the case of the second type of communication, "the Legal Counsel shares the concerns expressed by the Permanent Representative that it is highly desirable that, as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations".

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[513] Document prepared by the Treaty Section of the Office of Legal Affairs, ST/LEG/7/Rev.1, para. 206.

[514] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations (LA41TR/221 (23-1)). For further information on this time period, see the commentary to draft guideline 2.3.2, in A/56/10 supra, note 511, pp. 491-492, paras. (8) and (9).

(16) The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.[515] To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

(17) Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,[516] it is better to refer here to a "partial withdrawal".

(18) The second paragraph of draft guideline 2.5.10 [2.5.11] takes account of the alignment of the rules on partial withdrawal of reservations with those that apply in the case of a total withdrawal. Therefore, it implicitly refers to draft guidelines 2.5.1, 2.5.2, 2.5.5 [2.5.5. bis, 2.5.5 ter] 2.5.6 and 2.5.8 [2.5.9], which fully apply to partial withdrawals. The same is not true, however, regarding draft guideline 2.5.7, on the effect of a total withdrawal.[517]

(19) To avoid any confusion, the Commission also deemed it useful to set out in the first paragraph the definition of what constitutes a partial withdrawal. The definition draws on the actual definition of reservations that stems from article 2 (d) of the 1969 and 1986 Vienna Conventions and on draft guidelines 1.1 and 1.1.1 [1.1.4] (to which the phrase "achieve a more complete application … of the treaty as a whole" refers).

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[515] Cf. draft guidelines 2.3.1 to 2.3.3, ibid., pp. 462-495.

[516] See above, paras. (14) to (16).

[517] See draft guideline 2.5.11 and para. (1) of the commentary.

(20) It is not, however, aligned with that guideline: whereas a reservation is defined "subjectively" by the objective pursued by the author (as reflected by the expression "purports to …" in those provisions), partial withdrawal is defined "objectively" by the effects that it produces. The explanation for the difference lies in the fact that, while a reservation produces an effect only if it is accepted (expressly or implicitly),[518] withdrawal, whether total or partial, produces its effects and "the consent of a State or international organization which has accepted the reservation is not required";[519] nor indeed is any additional formality. This effect is mentioned in the first paragraph of draft guideline 2.5.10 [2.5.11] (partial withdrawal "limits the legal effect of the reservation and ensures more completely the application of the provisions of the treaty, or the treaty as a whole") and explained in draft guideline 2.5.11 [2.5.12]

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as the author does not withdraw it, to the extent that the objection does not apply exclusively to the part of the reservation which has been withdrawn.

No objection may be made to the reservation resulting from a partial withdrawal, unless that partial withdrawal has a discriminatory effect.

Commentary

(1) While the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal,[520] the problem also arises of whether the provisions of draft guideline 2.5.7 [2.5.7, 2.5.8] ("Effect of withdrawal of a reservation") can be transposed to partial withdrawals. In fact, there can be no hesitation: a partial withdrawal of a partial reservation cannot be compared to that of a total withdrawal nor can it be held that "the *partial*

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[518] See art. 20 of the Vienna Conventions.

[519] See draft guideline 2.5.1.

[520] See above, the commentary to draft guideline 2.5.10 [2.5.11], para. (18).

withdrawal of a reservation entails the application *as a whole* of the provisions to which the reservation related in the relations between the State or international organization which *partially* withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation".[521] Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other Contracting Parties, but not "as a whole" since, hypothetically, the reservation (in a more limited form, admittedly) remains.

(2) However, while partial withdrawal of a reservation does not constitute a new reservation,[522] it nonetheless leads to modification of the previous text. Thus, as the first sentence of draft guideline 2.5.11 [2.5.12] specifies, the legal effect of the reservation is modified "to the extent of the new formulation of the reservation". This wording is based on the terminology used in article 21 of the Vienna Conventions[523] without entering into a substantive discussion of the effects of reservations and objections thereto.

(3) Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,[524] even if those objections had been accompanied by opposition to the entry into force of the treaty with the reserving State or international organization.[525] There is no reason for this to be true in the case of a partial withdrawal.

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[521] Cf. draft guideline 2.5.7.

[522] See the commentary to draft guideline 2.5.10 [2.5.11], para. (15).

[523] Cf. article 21, para. 1: "A reservation established with regard to any party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation".

[524] Cf. the first paragraph of draft guideline 2.5.7 [2.5.7, 2.5.8] ("… whether they had accepted the reservation or objected to it").

[525] Cf. the second paragraph of draft guideline 2.5.8 [2.5.9].

Admittedly, States or international organizations that had made objections would be well advised to reconsider them and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation and they may certainly proceed to withdraw them,[526] but they cannot be required to do so and they may perfectly well maintain their objections if they deem it appropriate, on the understanding that the objection has been expressly justified by the part of the reservation that has been withdrawn. In the latter case, the objection disappears, which is what is meant by the phrase "to the extent that the objection does not apply exclusively to the part of the reservation which has been withdrawn". Two questions nonetheless arise in this connection.

(4) The first is to know whether the authors of an objection not of this nature must formally confirm it or whether it must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.[527] This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; a priori, the objections that were made to it rightly continue to apply as long as their authors do not withdraw them. The second sentence of the first paragraph of draft guideline 2.5.11 [2.5.12] draws the necessary consequences.

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[526] See the commentary to draft guideline 2.5.10 [2.5.11], para. (11) and supra, note 502.

[527] The objections of Denmark, Finland, Mexico, Netherlands, Norway or Sweden to the reservation formulated by the Libyan Arab Jamahiriya to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (see the commentary to draft guideline 2.5.10 [2.5.11], supra, note 510 were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties deposited with the Secretary-General*, Status at 31 December 2000 (United Nations publication, Sales No. E.01.V.5), vol. I, chap. IV.8, pp. 245-250.

(5) The second question that arises is whether partial withdrawal of the reservation can, conversely, constitute a new opportunity to object to the reservation resulting from the partial withdrawal. Since it is not a new reservation, but an attenuated form of the existing reservation, reformulated so as to bring the reserving State's commitments more fully into line with those provided for in the treaty, there might seem, prima facie, very doubtful that the other Contracting Parties can object to the new formulation:[528] if they have adapted to the initial reservation, it is difficult to see how they can go against the new one, which, in theory, has attenuated effects. In principle, therefore, a State cannot object to a partial withdrawal any more than it can object to a pure and simple withdrawal.

(6) In the Commission's view, there is nonetheless an exception to this principle. While there seems to be no example, a partial withdrawal might have a discriminatory effect. Such would be the case if, for instance, a State or an international organization renounced a previous reservation except vis-à-vis certain parties or categories of parties or certain categories of beneficiaries to the exclusion of others. In those cases, it would seem necessary for those parties to be able to object to the reservation even though they had not objected to the initial reservation when it applied to all of the Contracting Parties together. The second paragraph of draft guideline 2.5.11 [2.5.12] sets out both the principle that it is impossible to object to a reservation in the event of a partial withdrawal and the exception when the withdrawal is discriminatory.

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[528] Whereas they can certainly remove their initial objections, which, like reservations themselves, can be withdrawn at any time (see art. 22, para. 2, of the 1969 and 1986 Vienna Conventions); see the commentary to draft guideline 2.5.10 [2.5.11], para. (11).

CHAPTER IX

SHARED NATURAL RESOURCES

A. Introduction

369. The Commission, at its fifty-fourth session in 2002, decided to include the topic "Shared natural resources" in its programme of work.[529]

370. The Commission further decided, at its 2727th meeting, on 30 May 2002, to appoint Mr. Chusei Yamada as Special Rapporteur.[530]

371. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic "Shared natural resources" in its programme of work.

B. Consideration of the topic at the present session

372. At the present session the Commission had before it the first report of the Special Rapporteur (A/CN.4/533 and Add.1).

373. The Commission considered the first report of the Special Rapporteur at its 2778th and 2779th meetings, held on 22 and 23 July 2003, respectively. The Commission also had an informal briefing by experts on groundwaters from the Food and Agriculture Organization and the International Association of Hydrogeologists (IAH) on 30 July 2003. Their presence was arranged by the United Nations Educational, Scientific and Cultural Organization.

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[529] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10); chap. X.A.1, para. 518.

[530] Ibid., para. 519.

1. Introduction by the Special Rapporteur of his first report

374. The Special Rapporteur indicated that the report before the Commission (A/CN.4/533 and Add.1) was of a preliminary nature; it sought to provide the background on the topic and to seek general guidance from the Commission on the course of the future study, as well as provide a tentative timetable for the endeavour.

375. In relation to the title, the Special Rapporteur felt that it should be retained as is, since the General Assembly had officially approved it.

376. He recalled that the problem of shared natural resources had first been dealt with by the Commission during its codification of the law of non-navigational uses of international watercourses. At the time, the Commission had decided to exclude confined groundwaters unrelated to surface waters from the topic; nonetheless, it was also felt then that a separate study was warranted due to the importance of confined groundwaters in many parts of the world. It was noted that the law relating to groundwaters was more akin to that governing the exploitation of oil and gas.

377. Under the topic, the Special Rapporteur proposed to cover confined transboundary groundwaters, oil and gas and to begin with confined transboundary groundwaters. In order to ascertain the extent to which the principles embodied in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses could be applicable, he deemed it indispensable to know exactly what such groundwaters were. He also pointed out that the work carried out on the topic of international liability, particularly regarding the prevention aspect, would be relevant.

378. The addendum to the report was technical in nature and sought to provide a better understanding of what constituted confined transboundary groundwaters. He noted that international efforts to manage groundwaters were taking place in different forums.

379. The Special Rapporteur pointed out that although sharing the same atmospheric source, confined groundwaters were distinct from surface waters in several respects. Unlike the latter, the management of groundwaters was quite recent, as was the science of hydrogeology; if

extracted, some groundwater resources could be depleted quickly; unrelated activities on the surface of the soil could have adverse effects on groundwaters, so it might be necessary to consider regulating activities other than uses of groundwaters.

380. Although the term "confined transboundary groundwaters" was understandable in an abstract manner, he indicated that it was not so clear whether the concept was viable in implementing groundwater management. Even in regions with the more advanced management of groundwaters, no categorization had been made between related and unrelated groundwaters. In addition, he noted that hydrogeologists used the term "confined" in the sense of pressurized aquifers. In light of the fact that for the experts a shallow aquifer was not considered confined, only a fossil one could have that categorization, it appeared necessary to find terminology that could be readily understood by all.

381. The Special Rapporteur concluded by indicating that he intended to conduct studies on the practice of States with respect to uses and management, including pollution prevention, and cases of conflicts, as well as domestic and international rules. Furthermore, he would attempt to extract some legal norms from existing regimes and possibly prepare some draft articles.

2. Summary of the debate

382. The speakers welcomed the first report which set out the background of the topic and the main issues that could be dealt with. As the report indicated, given the fundamental role played by water in satisfying basic human needs, there were long-term impacts of the topic on international peace and security. Support was expressed for the prudent approach taken by the Special Rapporteur that emphasized the need for further study of the technical and legal aspects before making a final decision on how the Commission should proceed.

383. Some members drew attention to the link with the topic of international liability and felt that some harmonization of the work on the two subjects was feasible.

384. Some members considered that the title was too broad and could be clarified, for example, by adding a subtitle that would specify the three subtopics the Special Rapporteur intended to deal with or by referring exclusively to the subtitle of confined transboundary

groundwaters. The title also needed more precision as to the meaning of the term "shared": Who would share and when? Would it also apply to oil and gas? In this connection, it was said that, given the extremely varied nature of aquifers, the metaphor of sharing was hardly applicable.

385. As regards the suggested changes to the title of topic, it was noted that the General Assembly had officially approved it and that, if necessary, it could nonetheless be modified at a later stage.

386. Some misgivings were voiced concerning the exclusion from the first report of shared resources such as minerals and migratory animals. Nonetheless, it was stated that the problems posed by minerals were of a different nature and that the issues posed by migratory animals could best be addressed through bilateral or multilateral agreements.

387. The view was expressed that a single report encompassing oil and gas in addition to groundwater would have given a better overview of the subject, particularly as regards the principles applicable to the three resources and the differences among them.

388. Some doubts were voiced regarding the contribution which the Commission might be able to make as regards the suggested subtopics of oil and gas, whose problems were of a different nature and which were usually addressed through diplomatic and legal processes.

389. It was suggested that priority be given to the subject of confined groundwaters and, in particular, to the issue of non-connected groundwater pollution. The view was expressed that any consideration of the topic of oil and gas should be postponed until the Commission has concluded its work on groundwaters.

390. Given the characteristics of groundwaters, the question was also posed as to whether, a framework regime might be applicable to groundwaters. It was also stressed that the principle of sovereignty was as relevant to groundwaters, as it was for oil and gas, and that, accordingly, any reference to the concept of common heritage of mankind would raise concerns.

391. The point was made that more detailed consideration of the scope of the study on confined transboundary groundwaters was required. The research should, it was suggested, include not only the practice regarding the protection of the quality of aquifers, but also of their exploitation. In this connection, it would be important to look at the criteria for sharing a resource: the needs of a State, proportionality or fairness.

392. The view was expressed that a terminological clarification on the precise meaning of the term "groundwaters" was warranted and that the assistance of experts would be most helpful in this regard. It was also pointed out that there was a need to understand the differences between confined groundwaters and surface waters, as proposed in the report and to clarify the meaning of "confined" since it did not seem to be a term used by hydrogeologists.

393. It was also suggested that the Commission needed to develop a definition of transboundary groundwaters not connected to surface water and to determine their significance for States, in particular developing ones. In addition, the inclusion in future reports of additional statistics from developing countries, which had a greater reliance on groundwaters than developed ones, was deemed desirable.

394. Support was also expressed for the idea that the Special Rapporteur should obtain an inventory of confined transboundary groundwaters at a global level with an analysis of the regional characteristics of the resources.

395. Some members suggested that it was crucial to be very cautious in the approach to the topic, which should avoid being too global and should take into consideration relevant regional developments. In this regard it was highlighted that existing international agreements only referred to the management of the natural resources, not to their ownership or exploitation.

396. Some members expressed the view that the means of dealing with the world water crisis mentioned in the report was a matter that fell under the responsibility of States under whose surface the resources were found; that was the case insofar as oil and gas resources were concerned and there was no reason why a different approach should be applied to groundwater

resources. It was also stated that the principles governing the permanent sovereignty of States over natural resources enshrined in General Assembly resolution 1803 (XVII) of 14 December 1962 should be taken into account.

397. Some other members voiced their doubts regarding the applicability to the topic of the principles contained in the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses; it was felt that some of those principles could not be transposed automatically to the management of a fundamentally non-renewable and finite resource such as groundwaters. This was for example the case of article 5 of the Convention which dealt with the principle of equitable and reasonable utilization. In other cases however, the provisions of the Convention were too weak or required modification; given the vulnerability of fossil aquifers to pollution, article 7 of the Convention regarding the measures to prevent causing significant harm to other States was not sufficient. Some members also expressed concern regarding the scope of the present study vis-à-vis the Convention on the Law of the Non-navigational Uses of International Watercourses.

398. Other members were of the view that for now, the specific features of groundwaters required analysis and that analogies with international conventions could be made at a later stage.

399. The point was made that, in light of the complexity of the topic, the study on groundwaters might require more time than foreseen by the Special Rapporteur.

400. Based on the information provided by the report, it did appear likely that stricter standards of use and pollution prevention than those applied to surface waters would be required; it was also suggested that stricter standards than those falling under the topic of liability and the notion of "significant harm" would be appropriate. The need for a mechanism for the settlement of disputes was also mentioned.

401. The view was also expressed that there would not be any legal "solution" to the problems raised, but that success in dealing with such issues would entail a complex combination of political, social and economic processes. Accordingly, the Commission should not embark on

the development of a prescriptive set of rules, but rather a regime that helped States to cooperate with each other and to identify appropriate techniques for resolving differences which might arise in accessing and managing the resources referred to.

402. The view was expressed that the Commission could elaborate general principles on the topic, taking due account of regional mechanisms. It was also stated that a decision on the form of the norms which the Commission could elaborate could be taken at a later stage.

3. Special Rapporteur's concluding remarks

403. The Special Rapporteur indicated that, as regards the concerns expressed about the term "shared", his understanding of the notion of "shared" was that it referred not to ownership, but to the responsibility for resource management and that the controversy could be overcome by defining the scope of the topic in physical terms.

404. He expressed his preference for focusing first on the subject of confined transboundary groundwaters and deferring a final decision regarding scope to a later stage. The debate had also highlighted the need to reconsider the definition of the groundwater to be dealt with in the study.

405. In regard to the problems posed by confined transboundary groundwaters, he concurred with the view that a legal solution did not constitute a panacea and that it might therefore be preferable to formulate certain principles and cooperation regimes, including dispute settlement. The Special Rapporteur also conceded that further analysis was required before being able to ascertain the extent to which the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were applicable to confined transboundary groundwaters; the same could be said of the elaboration of stricter thresholds in relation to transboundary harm.

406. In addition, he noted that regional regimes might be more effective than a universal one and therefore felt that their important role could be adequately recognized in the formulation of rules.

CHAPTER X

FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW

A. Introduction

407. The Commission, at its fifty-second session in 2000, following its consideration of a feasibility study[531] that had been undertaken on the topic entitled "Risks ensuing from fragmentation of international law", decided to include the topic in its long-term programme of work.[532]

408. The General Assembly, in resolution 55/152 of 12 December 2000, in paragraph 8, took note of the Commission's decision with regard to the long-term programme of work, and of the syllabus on the new topic, annexed to the 2000 report of the Commission.

409. The General Assembly, in paragraph 8 of resolution 56/82 of 12 December 2001, requested the Commission to give further consideration to the topics to be included in its long-term programme of work, having due regard to comments made by Governments.

410. At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work and established a Study Group on the topic. It also decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[533] It also agreed on a number of recommendations, including on a series of studies to be undertaken, commencing first with a study, to be undertaken by the Chairman of the Study Group, entitled "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'".

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[531] G. Hafner, "Risks Ensuing from Fragmentation of International Law", *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex.

[532] Ibid., chap. IX.A.1, para. 729.

[533] Ibid., *Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. IX.A, paras. 492-494.

411. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note, inter alia, of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

412. At the present session, the Commission decided, at its 2758th meeting, held on 16 May 2003, to establish an open-ended Study Group on the topic and appointed Mr. Martti Koskenniemi as Chairman, to replace Mr. Bruno Simma who was no longer in the Commission having been elected as judge to the International Court of Justice.

413. The Study Group held four meetings on 27 May and 8, 15 and 17 July 2003. Its discussions were focused on setting a tentative schedule for work to be carried out during the remaining part of the present quinquennium (2003-2006), on distributing among members of the Study Group work on studies (b) to (e)[534] decided in 2002, on deciding upon the methodology to be adopted for that work and on a preliminary discussion of an outline by the Chairman of the question of "The function and scope of the *lex specialis* rule and the question of self-contained regimes" (topic (a), decided in 2002).

414. At its 2779th meeting, held on 23 July 2003, the Commission took note of the report of the Study Group.

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[534] The following topics were included in 2002: (a) The function and scope of the *lex specialis* rule and the question of "self-contained regimes"; (b) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (art. 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community; (c) The application of successive treaties relating to the same subject matter (art. 30 of the Vienna Convention on the Law of Treaties); (d) The modification of multilateral treaties between certain of the parties only (art. 41 of the Vienna Convention on the Law of Treaties); (e) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules.

C. Report of the Study Group

1. General comments

415. During an initial exchange of views, the Study Group proceeded on the basis essentially of a review of the report of the 2002 Study Group (A/57/10, paras. 489 to 513); and the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat (A/CN.4/529, sect. F).

416. Commenting on the background to the topic and approaches to be followed, it was noted that an examination of the various statements and written works on the subject of fragmentation revealed that a distinction ought to be drawn between institutional and substantive perspectives. While the former focused on concerns relating to institutional questions of practical coordination, institutional hierarchy, and the need for the various actors - especially international courts and tribunals - to pay attention to each other's jurisprudence, the latter involved the consideration of whether and how the substance of the law itself may have fragmented into special regimes which might be lacking in coherence or were in conflict with each other.

417. It was observed that such a distinction was important especially in determining how the Commission would carry out its study. An analysis of the Commission's discussion at its fifty-fourth session (2002) seemed to reveal a preference for a substantive perspective. In paragraph 505 of the 2002 report,[535] there was agreement that the Commission should not deal with questions concerning the creation of, or the relationship among, international judicial institutions. In other words, the Commission was not being asked to deal with institutional proliferation.

418. The Sixth Committee of the General Assembly seemed to agree with the Commission in this regard. It transpired from paragraph 227 of the Topical Summary that several delegations

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[535] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), chap. IX.

agreed that the Commission should not for the time being deal with questions of the creation of or the relationship among international judicial institutions and from paragraph 229 that the Commission should not act as a referee in the relationships between institutions.

419. In dealing with the substantive aspects, it was observed that it would be necessary to bear in mind that there were at least three different patterns of interpretation or conflict, which were relevant to the question of fragmentation but which had to be kept distinct:

(a) Conflict between different understandings or interpretations of general law. Such was the scenario in the *Tadic* case.[536] In its judgment, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia deviated from the test of "effective control" employed in the *Nicaragua* case[537] by the International Court of Justice as the legal criterion for establishing when, in an armed conflict which is prima facie internal, an armed military or paramilitary group may be regarded as acting on behalf of a foreign power. Instead, it opted for an "overall control" test. In that particular case, the Tribunal examined the Court's and other jurisprudence and decided to depart from the reasoning in the Court's judgment;

(b) Conflict arising when a special body deviates from the general law not as a result of disagreement as to the general law but on the basis that a special law applies. No change is contemplated to the general law but the special body asserts that a special law applies in such a case. This circumstance has arisen in human rights bodies when applying human rights law in relation to the general law of treaties, particularly in cases concerning the effects of reservations.

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[536] *The Prosecutor v. Duško Tadic*, Judgment, Case No. IT-94-1-A, A.Ch., 15 July 1999, paras. 115-145.

[537] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *I.C.J. Reports*, 1986, p. 14 at paras. 109-116. The Court observed in that case that there must be "effective control of the military or paramilitary operations in the course of which the alleged violations [of human rights and humanitarian law] were committed": para. 115. The same test of "effective control" was not utilized by the Court with respect to Nicaragua's other claims.

In the *Belilos* case,[538] the European Court of Human Rights struck down an interpretative declaration by construing it first as an inadmissible reservation and then disregarding it while simultaneously holding the declaring State as bound by the Convention;

(c) Conflict arising when specialized fields of law seem to be in conflict with each other. There may, for example, exist conflict between international trade law and international environmental law. The approaches in the jurisprudence on this matter have not been consistent. The GATT dispute settlement panel in its 1994 report in *Tuna/Dolphins disputes*,[539] while acknowledging that the objective of sustainable development was widely recognized by the GATT Contracting Parties, observed that the practice under the bilateral and multilateral treaties dealing with the environment could not be taken as practice under the law administered under the GATT regime and therefore could not affect the interpretation of it. In the *Beef Hormones* case,[540] the Appellate Body of the World Trade Organization concluded that whatever the status of the "precautionary principle" under environmental law, it had not become binding on the WTO as it had not, in its view, become binding as a customary rule of international law.

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[538] *Belilos v. Switzerland*, Judgment of 29 April 1988, 1988 ECHR (Ser. A), No. 132, para. 60.

[539] *United States - Restrictions of Imports of Tuna, 33 ILM* (1994) 839. See also *United States - Restrictions of Imports of Tuna, 30 ILM* (1991) 1594. The 1994 Panel further noted that the relationship between environmental and trade measures would be considered in arrangements to establish the WTO: at p. 899. See, however, also *Shrimp/Turtle disputes: United States-Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, Report of Appellate Body, WT/DS58/AB/R which acknowledged the significance of the need to protect and preserve the environment, including the adoption of effective measures to protect endangered species, and for members to act together bilaterally or multilaterally within the WTO or other forums to protect such species. It stressed, however, that any such measures should be applied in a manner that would not constitute arbitrary and unjustified discrimination between members of the WTO or disguised trade restrictions: paras. 184-186. For references to various environmental treaties, see paras. 129-135, 153-155 and 168.

[540] *EC Measures concerning Meat and Meat Products* (Hormones) - AB-1997-4 - Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, paras. 120-125.

420. The above examples were viewed only as illustrative of the conceptual framework in which substantive conflict might arise without passing judgment on the merits of each case or without implying that these were the only ways to understand them. The three situations - conflict between different understandings or interpretations of general law, between general law and a special law claiming to exist as an exception to it, and between two specialized fields of law - were to be kept analytically distinct only because they would raise the question of fragmentation in different ways.

421. Furthermore, it was noted that in paragraph 506 of the 2002 report, the Commission decided not to draw hierarchical analogies with domestic legal systems. Hierarchy was not completely overlooked from the Commission's study, however. In the recommendations in paragraph 512 (e) of the 2002 report of the Commission, "Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules" was identified for further study.

422. The Study Group observed that although some concern had been voiced about the appropriateness for study of the topic of fragmentation, it had received general support from the Sixth Committee of the General Assembly during its fifty-seventh session. The Sixth Committee considered the topic to be of great current interest in view of the possibility of conflicts emerging, at substantive and procedural levels, as a result of the proliferation of institutions that apply or interpret international law. It found that the difference in nature of the topic from other topics previously considered by the Commission warranted the creation of the Study Group. The positive and negative aspects of fragmentation were also highlighted and support was expressed for studies to be carried out and seminars organized.

423. The recommendations made by the Commission in its 2002 report also had been broadly supported in the Sixth Committee. There appeared to be a preference for a comprehensive study of the rules and mechanisms for dealing with conflicts. The Assembly had also endorsed the Commission's view that the Vienna Convention on the Law of Treaties would provide an appropriate framework within which the study would be carried out. The proposal also to consider the question of the *lex posterior* rule had been made, but it had also been considered that this would take place within the present programme of work.

2. Tentative Schedule, Programme of work and methodology

424. The Study Group agreed upon the following tentative schedule for 2004 to 2006. It essentially agreed to proceed on the basis of the recommended studies contained in paragraph 512 of the Commission's 2002 report.

425. For 2004, it was agreed that a study on "the function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" would be undertaken by the current Chairman of the Study Group on the basis of the outline and the discussion in the Study Group in 2003. This should also contain an analysis of the general conceptual framework against which the whole question of fragmentation has arisen and is perceived. The study might include draft guidelines to be proposed for adoption by the Commission at a later stage of its work.

426. For 2004, it was also agreed that shorter introductory outlines on the remaining studies in paragraph 512 (b) to (e) would be prepared by members of the Commission. These outlines should focus, inasmuch as appropriate, on the following four questions (a) the nature of the topic in relation to fragmentation; (b) the acceptance and rationale of the relevant rule; (c) the operation of the relevant rule; (d) conclusions, including possible draft guidelines.

427. The distribution of work on the preparation of the outlines was agreed as follows:

(a) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community: Mr. William Mansfield;

(b) The application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention on the Law of Treaties): Mr. Teodor Melescanu;

(c) The modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention on the Law of Treaties): Mr. Riad Daoudi;

(d) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules: Mr. Zdzislaw Galicki.

428. For 2005, the five studies would be completed. The Study Group would also hold a first discussion on the nature and content of possible guidelines and 2006 is reserved for the collation of the final study covering all topics, including the elaboration of possible guidelines.

3. Discussion of study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes"

429. In its discussion of the topic, the Study Group focused on an outline of the study prepared by the Chairman. The Study Group welcomed the general thrust of the outline, which dealt with inter alia the normative framework of fragmentation. There was support for the general conceptual framework proposed, distinguishing the three types of normative conflict against which the question of fragmentation should be considered as described at paragraph 419 above. While fragmentation through conflicting interpretations of the general law was not necessarily a case of *lex specialis*, it was considered an important aspect of fragmentation worth further study. Mindful of the sensitivity of addressing institutional issues, it was suggested that such consideration be confined to an analytical assessment of the issues involved, including the possibility of making practical suggestions relating to increased dialogue among the various actors.

430. The Study Group considered the preliminary conceptual questions addressed within the outline relating to the function and the scope of the *lex specialis* rule. The questions focused on the nature of the *lex specialis* rule, its acceptance and rationale, the relational distinction between the "general" and the "special" rule and the application of the *lex specialis* rule in regard to the "same subject matter".

431. There was agreement that the *lex specialis* rule could be said to operate in the two different contexts proposed by the outline, namely *lex specialis* as an elaboration or application of general law in a particular situation and *lex specialis* as an exception to the general law. A narrower view considered *lex specialis* to apply only where the special rule was in conflict with the general law. It was agreed that the expository study should cover both the broad and narrow conceptions of *lex specialis*, with a view to possibly confining the approach at a later stage. In addition, the situation should be considered where derogation was prohibited by the general rule.

432. It was decided that areas regulated by regional law, which some members thought were conceptually different from *lex specialis,* should be considered within this topic. Similarly, it was considered that questions concerning the measures undertaken by regional arrangements or organizations in the context of a centralized collective security system under the Charter of the United Nations might deserve attention. It was also considered useful to investigate further and expand the general conclusions concerning the omnipresence of principles of general international law against which the *lex specialis* rule applied, taking into account the different views expressed in the Study Group on the subject.

433. The Study Group considered the alleged existence of "self-contained regimes" as discussed in the outline. It was agreed that while such regimes were sometimes identified by reference to special secondary rules contained therein, the distinction between primary and secondary rules was often difficult to apply and might not be required for the study. In reviewing the acceptance and rationale of such regimes as well as the relationship between self-contained regimes and general law, the Study Group emphasized the importance of general international law also within its analysis of the issues. In particular, it was stressed that general international law regulated those aspects of the functioning of a self-contained regime not specifically regulated by the latter, and became fully applicable in case the "self-contained regime" might cease to function.

434. The Study Group agreed that it would be useful to consider *lex specialis* and self-contained regimes against the background of general law. It considered, however, that in elucidating the relations between *lex specialis* and general international law it would be useful to proceed by way of concrete examples rather than engaging in wide-ranging theoretical discussions. It was, for example, probably unnecessary to take a firm stand on the issue whether or not international law could be described as a "complete system".

435. While the Study Group noted with interest the sociological and historical factors that gave rise to diversification, fragmentation and regionalism, such as the existence of common legal cultures, it stressed that its own study would concentrate on legal and analytical issues and the possible development of guidelines for consideration by the Commission.

CHAPTER XI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

436. At its 2758th meeting on 16 May 2003, the Commission established a Planning Group for the current session.

437. The Planning Group held seven meetings. It had before it the Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat entitled "Other decisions and conclusions of the Commission" (A/CN.4/529, sect. G) and paragraphs 7, 8, 10, 12 and 15 of General Assembly resolution 57/21 on the Report of the International Law Commission on the work of its fifty-fourth session.

438. At its 2783rd meeting on 31 July 2003, the Commission took note of the report of the Planning Group.

1. Working Group on long-term programme of work

439. The Planning Group reconstituted on 16 May 2003 its Working Group on the long-term programme of work and appointed Mr. Pellet as Chairman of this Working Group.

2. Documentation of the Commission

440. With regard to the question of the documentation of the Commission in light of the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services" (A/57/289) as well as paragraph 15 of General Assembly resolution 57/21, the Commission understands the background to the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services" (A/57/289), which aims to establish page limits for reports of subsidiary bodies. The Commission would like to recall, however, the particular characteristics of its work that make it inappropriate for page limits to be applied to the Commission's documentation.

441. The Commission notes that it was established to assist the General Assembly in the discharge of its obligation under Article 13, paragraph 1 (a), of the Charter of the United Nations, to encourage the progressive development and codification of international law. That obligation in turn stemmed from the recognition by those involved in drafting the Charter that, if international legal rules were to be arrived at by agreement, then in many areas of international law a necessary part of the process of arriving at agreement would involve an analysis and precise statement of State practice. Accordingly, by its Statute, the Commission must justify its proposals to the General Assembly and ultimately States, on the evidence of existing law and the requirements of its progressive development in the light of the current needs of the international community. This means that the draft articles or other recommendations contained in the reports of the Special Rapporteurs and the Report of the Commission itself have to be supported by extensive references to State practice, doctrine and precedents and accompanied by extensive commentaries. The Commission is required by Article 20 of its Statute to submit its draft articles to the General Assembly together with a commentary containing: (a) adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine; (b) conclusions relevant to (i) the extent of agreement on each point in the practice of States and doctrine; (ii) divergencies and disagreement which exist, as well as arguments invoked in favour of one or another solution.

442. In addition to the above legal requirements the Commission wishes further to note that its Report, the reports of its Special Rapporteurs and the related research projects, studies, working documents and questions directed to States are indispensable also for the following reasons:

(i) they are a critical component of the process of consulting States and obtaining their views;

(ii) they assist individual States in the understanding and interpretation of the rules embodied in codification conventions;

(iii) they are part of the *travaux preparatoires* of such conventions, and are frequently referred to, or quoted in the diplomatic correspondence of States, in argument before the International Court of Justice and by the Court itself in its judgments;

(iv) they contribute to the dissemination of information about international law in accordance with the relevant United Nations programme; and

(v) they form as important a product of the Commission's work as the draft articles themselves and enable the Commission to fulfil, in accordance with its Statute, the tasks entrusted to it by the General Assembly.

443. Accordingly, as the Commission has pointed out on previous occasions,[541] it considers that it would be entirely inappropriate to attempt in advance and *in abstracto* to fix the maximum length of reports of Special Rapporteurs or of its own Report or of the various related research projects, studies and other working documents. As explained above, the length of a given Commission document will depend on a number of variable factors, such as the nature of the topic and the extent of relevant State practice, doctrine and precedent. The Commission considers therefore that new regulations on page limits such as those contained in document A/57/289 should not apply to its own documentation, which should continue to remain exempted from page limitations as endorsed by previous resolutions of the General Assembly.[542] The Commission wishes to stress, however, that it and its Special Rapporteurs are fully conscious of the need for achieving economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind.

3. Relations of the Commission with the Sixth Committee

444. As one of the means of facilitating a better and more effective dialogue between the Commission and the Sixth Committee, the Commission, in its 1996 report,[543] proposed that it should:

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[541] See, *Yearbook ... 1977*, vol. II, Part Two, p. 132 and *Yearbook ... 1982*, vol. II, Part Two, pp. 123-4.

[542] See resolution 32/151, para. 10, resolution 37/111, para. 5, and all subsequent resolutions on the annual reports of the Commission to the General Assembly.

[543] *Yearbook ... 1996*, vol. II (Part Two), para. 181.

> "strive to extend its practice of identifying issues on which comment is specifically sought, if possible in advance of the adoption of draft articles on the point. These issues should be of a more general 'strategic' character rather than relating to issues of drafting technique".

The suggestion was welcomed by the Sixth Committee which requested the Commission, in paragraph 14 of its resolution 51/163, to identify the specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work.

445. Consequently, the Commission, in its 1997 report, added two additional chapters (Chap. II and III). Chapter II was to provide a very broad view of the work accomplished by the Commission at the current session on a particular topic and Chapter III was intended to provide in a single chapter issues relevant to specific topics on which views of Governments were particularly useful to the Commission. In addition in view of the size of the report of the Commission which leads to delay in its official production and circulation, the Secretariat of the Commission was requested to circulate Chapters II and III informally to Governments.

446. In order to improve further the utility of Chapter III, the Commission proposes that in preparing their questions and issues on which Governments' views are particularly sought, the Special Rapporteurs may wish to provide sufficient background and substantive elaboration to better assist Governments in developing their responses.

4. Honoraria

447. The Commission reiterated the views it had expressed in paragraphs 525 to 531 of its Report on the work of its fifty-fourth session (A/57/10). It re-emphasized that the decision of the General Assembly in resolution 56/272 was (i) in direct contradiction to the conclusions and recommendations of the Report of the Secretary-General in document A/53/643, (ii) taken without consultation with the Commission and (iii) not consistent in procedure or substance with either the principle of fairness on the basis of which the United Nations conducts its affairs or with the spirit of service with which members of the Commission contribute their time and

approach their work. The Commission stressed that the above resolution especially affects Special Rapporteurs, in particular those from developing countries, as it compromises the support for their necessary research work.

B. Date and place of the fifty-sixth session

448. The Commission decided to hold a 10-week split session which will take place at the United Nations Office in Geneva from 3 May to 4 June and 5 July to 6 August 2004.

C. Cooperation with other bodies

449. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Grandino Rodas. Mr. Rodas addressed the Commission at its 2764th meeting, on 28 May 2003, and his statement is recorded in the summary record of that meeting. An exchange of views followed.

450. At its 2775th meeting, on 15 July 2003, Judge Jiuyong Shi, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it and his statement is recorded in the summary record of that meeting. An exchange of views followed.

451. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law were represented at the present session of the Commission by Mr. Guy de Vel. Mr. de Vel addressed the Commission at its 2777th meeting, on 18 July 2003, and his statement is recorded in the summary record of that meeting. An exchange of views followed.

452. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Z. Kamil. Mr. Kamil addressed the Commission at its 2678th meeting, on 22 July 2003, and his statement is recorded in the summary record of that meeting. An exchange of views followed.

453. Members of the Commission held an informal exchange of views on issues of mutual interest, and in particular on the topic "Reservations to treaties" with members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights on 13 May 2003, with members of the Human Rights Committee on 31 July 2003, and with members of the Sub-Commission on the Promotion and Protection of Human Rights on 7 August 2003. On 30 July 2003, members of the Commission held an informal meeting on the topic "Shared natural resources" with experts from FAO and the International Association of Hydrogeologists, whose presence was arranged by UNESCO.

454. On 15 May 2003, an informal exchange of views focusing on fragmentation of international law was held between members of the Commission and members of the Société française de droit international. On 22 May 2003, an informal exchange of views was held between members of the Commission and members of the legal services of the International Committee of the Red Cross on topics of mutual interest. On 29 July 2003, an informal exchange of views was held between members of the Commission and members of the International Law Association on topics of mutual interest for the two institutions (diplomatic protection, responsibility of international organizations and the long-term programme of work).

455. These meetings expanding the Commission's exchanges of views and cooperation with other bodies were particularly useful.

D. Representation at the fifty-eighth session of the General Assembly

456. The Commission decided that it should be represented at the fifty-eighth session of the General Assembly by its Chairman, Mr. Enrique J.A. Candioti.

457. Moreover, at its 2790th meeting, on 8 August 2003, the Commission requested Mr. Giorgio Gaja to attend the fifty-eighth session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

458. Pursuant to General Assembly resolution 57/21, the thirty-ninth session of the International Law Seminar was held at the Palais des Nations from 7 July to 25 July 2003, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing an academic or diplomatic career or posts in the civil service in their country.

459. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[544] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures, and participated in working groups on specific topics.

460. The Seminar was opened by the Chairman of the Commission, Mr. Enrique J.A. Candioti. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar.

461. The following lectures were given by members of the Commission:
Mr. Victor Rodríguez Cedeño: "Unilateral Acts of States"; Mr. Pemmaraju Sreenivasa Rao: "Transboundary Harm arising from Hazardous Activities"; Mr. Djamchid Momtaz: "Mettre un terme à l'impunité"; Mr. John Dugard: "Diplomatic Protection"; Mr. Ian Brownlie: "The Work

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[544] The following persons participated in the thirty-ninth session of the International Law Seminar: Ms. Sylvia Ama Adusu (Ghana); Mr. Mutlaq Al-Qahtani (Qatar); Ms. Karine Ardault (France); Mr. Bernard Bekale-Meviane (Gabon); Mr. David Berry (Canada); Ms. Laura Castro Grimaldo (Panama); Ms. Athina Chanaki (Greece); Ms. Namalimba Coelho Ferreira (Angola); Mr. Rolands Ezergailis (Latvia); Ms. Suraya Harun (Malaysia); Ms. Khin Oo Hlaing (Myanmar); Mr. Azad Jafarov (Azerbaijan); Ms. Tamar Kaplan (Israel); Mr. Norman Antonio Lizano Ortiz (Costa Rica); Ms. Yvonne Mendoke (Cameroon); Mr. Ngor Ndiaye (Senegal); Ms. Tabitha Wanyama Ouya (Kenya); Ms. Elena Paris (Romania); Mr. Juha Rainne (Finland); Mr. Luther Rangreji (India); Ms. Daniela Schlegel (Germany); Ms. Karolina Valladares Barahona (Nicaragua); Ms. Cristina Villarino Villa (Spain); Mr. Edgar Ynsfrán Ugarriza (Paraguay). A Selection Committee, under the Chairmanship of Professor Georges Abi-Saab (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 8 April 2003 and selected 24 candidates out of 99 applications for participation in the Seminar.

of the International Court of Justice"; Mr. Giorgio Gaja: "Responsibility of International Organizations"; Mr. Chusei Yamada: "Shared Natural Resources"; Ms. Paula Escarameia: "Use of Force in International Law"; and Mr. Martti Koskenniemi: "Fragmentation of international law".

462. Lectures were also given by Mr. George Korontzis, Senior Legal Officer, Office of Legal Affairs: "Some aspects of recent developments in the Law of Treaties"; Mr. Arnold Pronto, Legal Officer, Office of Legal Affairs: "The Work of the ILC"; Mr. Steven Wolfson, Senior Legal Officer, UNHCR: "International Refugee Law"; Ms. Jelena Pejic, Legal Adviser, ICRC: "Current Challenges to International Humanitarian Law"; and Mr. Gian Luca Burci, Senior Legal Officer, WHO: "The WHO Framework Convention on Tobacco Control".

463. Each Seminar participant was assigned to one of two working groups on "Unilateral acts of States" and "Fragmentation of international law". The Special Rapporteurs of the ILC for these subjects, Mr. Victor Rodríguez Cedeño and Mr. Martti Koskenniemi, provided guidance for the working groups. The groups presented their findings to the Seminar. Each participant was also assigned to submit a written summary report on one of the lectures. A collection of the reports was compiled and distributed to all participants.

464. Participants were also given the opportunity to make use of the facilities of the United Nations Library.

465. The Republic and Canton of Geneva offered its traditional hospitality to the participants with a guided visit of the Alabama and Grand Council Rooms followed by a reception.

466. Mr. Enrique J.A. Candioti, Chairman of the Commission, Mr. Sergei Ordzhonikidze, Director-General of the United Nations Office at Geneva, Mr. Ulrich von Blumenthal, Director of the Seminar, and Ms. Cristina Villarino Villa, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the thirty-ninth session of the Seminar.

467. The Commission noted with particular appreciation that the Governments of Austria, Cyprus, Finland, Germany, Ireland, Republic of Korea and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The financial situation of the Fund allowed to award a sufficient number of fellowships to deserving candidates from developing countries in order to achieve adequate geographical distribution of participants. This year, full fellowships (travel and subsistence allowance) were awarded to 13 candidates and partial fellowship (subsistence or travel only) to 4 candidates.

468. Of the 879 participants, representing 154 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 522 have received a fellowship.

469. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations, which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2004 with as broad participation as possible. While the number and level of fellowships could be maintained in 2003, the funding situation remains precarious. Increased financial support is required in order to allow the same number of fellowships as in the past.

470. The Commission noted with satisfaction that in 2003 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, within existing resources.
